

No. 11200

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNION PACIFIC RAILROAD COMPANY, a  
Corporation, and LOS ANGELES & SALT  
LAKE RAILROAD COMPANY, a Corpora-  
tion,

Appellants,

vs.

W. L. OLIVE,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Nevada

FILED

JAN 17 1946

PAUL P. O'BRIEN,  
CLERK



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for the District of Nevada





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

McNAMEE & McNAMEE,  
El Portal Building,  
Las Vegas, Nevada,  
For the Appellants.

HAM & TAYLOR,  
Boggs Building,  
Las Vegas, Nevada,  
For the Appellee. [\*1]

In the Eighth Judicial District Court of the State  
of Nevada In and For the County of Clark

No. 11,746

W. L. OLIVE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation; LOS ANGELES & SALT LAKE  
RAILROAD COMPANY, a corporation, and  
WILLIAM MORLEY,

Defendants.

### COMPLAINT

Comes now the plaintiff and for a cause of action  
against the defendants, alleges:

#### I.

That the plaintiff is, and at all times hereinafter  
mentioned, was a resident of Clark County, State  
of Nevada;

#### II.

That the defendant, William Morley, is now, and  
at all times hereinafter mentioned, was a resident  
of Clark County, State of Nevada;

#### III.

That the defendant, Union Pacific Railroad Com-  
pany, is a corporation organized and existing under  
and by virtue of the laws of the State of Utah;  
That the defendant, Los Angeles & Salt Lake Rail-  
road Company, is a corporation organized and ex-



isting under and by virtue of the laws of the State of Utah;

#### IV.

That for more than ten (10) years immediately preceding the first day of January, 1936, the defendant Los Angeles & Salt Lake Railroad Company, a corporation, was engaged as a common carrier of passengers and freight in the operation of its railroad in the State of Nevada; that its main line track, during the said period, entered into the County of Clark at or near Jean, Nevada, and extends northeasterly through the City of Las Vegas, County of Clark, State of Nevada, and thence northeasterly through the said County of Clark and on to Salt Lake City, Utah.

#### V.

That the plaintiff is informed and believes, and upon such information and belief, alleges the fact to be that for a period of five (5) years and more immediately preceding the first day of January, 1936, the defendant corporation Union Pacific Railroad Company was engaged in the transportation of passengers and freight over and along its system of railroads from Chicago, Illinois, to [3] Los Angeles, California, and intermediate points, under the name and style of "Union Pacific System"; That the defendant Los Angeles & Salt Lake Railroad Company is, and was at said times, a part of and member of said "Union Pacific System" aforesaid, and during all of said period of time and up to the present the said defendant Union Pacific Railroad

Company has, under an arrangement known to the defendants but unknown to the plaintiff, used the tract, cars, locomotives, employees, including the plaintiff herein, and other facilities of the defendant Los Angeles & Salt Lake Railroad Company, jointly with the latter named company, between Los Angeles, California, and Salt Lake City, Utah, for the purpose of conveying its freight and passenger traffic over the said railroad of the defendant Los Angeles & Salt Lake Railroad Company aforesaid.

## VI.

That the plaintiff is informed and believes, and upon such information and belief, alleges the fact to be that on the first day of January, 1936, the defendant corporation Los Angeles & Salt Lake Railroad Company entered into a written agreement with the defendant Union Pacific Railroad Company whereby and in virtue of which as Lessor, the said Los Angeles & Salt Lake Railroad Company did lease, demise, assign and transfer to Union Pacific Railroad Company, defendant herein, its successors and assigns:

(a) All lines of railroad, together with all rights, privileges, franchises and rolling stock and other property appertaining thereto, now or at any time during the term of this lease owned by the Lessor.

(b) All right, title and interest of the Lessor in and to all other lines of railroad, railroad terminals and other operating properties, together with all rights, privileges, franchises and property appertaining thereto, operated, used or possessed by

the Lessor, solely or jointly with other companies, under or by virtue of leases, joint ownership agreements, grants of trackage rights, [4] or other contracts, and all right, title and interest of the Lessor in and under all such leases, joint ownership agreements, grants of trackage rights and other contracts.

(c) All miscellaneous physical properties owned by the Lessor, and all right, title and interest of the Lessor in and to miscellaneous physical properties used or possessed by it under lease or contract, and all right, title and interest of the Lessor in and under all such leases and contracts.

(d) All right, title and interest of the Lessor in and under any and all other ordinances, grants, easements and licenses held or enjoyed for the purpose of or in connection with the operation or use of the demised premises, and in and under any and all contracts for telegraph, express, Pullman car, or refrigerator car services and other contracts of every kind relating to the operation of the demised premises, whether now in force and effect or acquired or made during the term of this lease.

That the said lease and agreement is now in full force and effect.

## VII.

That for a period of more than ten (10) years immediately prior to January 1, 1936, the plaintiff herein had been employed jointly by the defendant Los Angeles & Salt Lake Railroad Company and the defendant Union Pacific Railroad Company, as

a Car Repairman and Car Inspector, at the shop of the defendants, at Las Vegas, Nevada.

### VIII.

That on the first day of November, 1934, while so employed, plaintiff was a member of the labor organization known as and called the "Brotherhood Railway Carmen of America."

### IX.

That on the first day of November, 1934, while the plaintiff was a member of the said Brotherhood Railway Carmen of America, and employed by the defendant corporations as a Car Repairman and [5] Car Inspector, the said Brotherhood was then the recognized and authorized bargaining agency for the said men then employed by the defendants Los Angeles & Salt Lake Railroad Company and Union Pacific Railroad Company.

### X.

That on the first day of November, 1934, the said Brotherhood Railway Carmen of America entered into an agreement for the benefit of all members of said Brotherhood Railway Carmen of America with the Los Angeles & Salt Lake Railroad Company and the Union Pacific Railroad Company, which said agreement set forth the respective rights and duties of the said corporations and the said Brotherhood Railway Carmen of America and the individual members thereof with respect to the employment of the members of the said Brotherhood Railway Carmen of America.

## XI.

That the said agreement provides, among other things, as follows:

“No employe shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal.” Rule 37.

“No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employe be discharged for any cause without first being given an investigation.” Rule 38.

## XII.

That the said agreement is now and has been ever since the first day of November, 1934, in full force and effect. [6]

## XIII.

That on the 25th day of May, 1936, the plaintiff herein, while so employed by the defendants, Union

Pacific Railroad Company and Los Angeles & Salt Lake Railroad Company, was unlawfully and without cause, suspended from service and from such employment, and remained suspended from service until the 20th day of August, 1936, at which time the plaintiff was, unlawfully and without cause, by the said defendants, dismissed and discharged from service of the said defendants, and both of them.

#### XIV.

That prior or incidental to the said suspension, dismissal or discharge, the plaintiff was not accorded a fair or any hearing by a designated officer of the defendants, or either of them.

#### XV.

That the plaintiff, prior to the said suspension, dismissal and discharge, was not apprised of the precise charge, or any charge, against him by the defendants, or either of them.

#### XVI.

That prior to the said suspension, dismissal and discharge the plaintiff herein was not given an investigation.

#### XVII.

That prior to the time of the said suspension, dismissal and said discharge, and ever since the said suspension, dismissal and discharge, the plaintiff has presented himself for employment to the said defendants, agreeably with the provisions of said contract; that at all said times the said offer was made in good faith and the plaintiff was ready,



able and willing to perform his services, agreeably with the provisions of the said contract but the defendants, at all said times mentioned, failed and refused to employ or reinstate the plaintiff herein and have failed and refused to compensate him for wages or time lost since the said dismissal and discharge. [7]

### XVIII.

That the plaintiff was not afforded a reasonable or any opportunity to secure the presence of necessary or any witnesses in his behalf nor was he afforded the right to be present himself or with counsel, relating to the causes for suspension or discharge, or at all.

### XVIX.

That prior to the said suspension, dismissal and said discharge, plaintiff was, except when on leave of absence, earning regularly the sum of Six and 32/100 Dollars (\$6.32) per 8-hour day for six (6) days a week for each and every week, and the said sum was, at the time of said suspension, dismissal and discharge, and now is, the regular going wage for like employment.

### XX.

That since the wrongful suspension and discharge aforesaid, and as a result thereof, the plaintiff herein has, to the 25th day of March, 1941, been deprived of compensation, as a result of said suspension and dismissal, for a period of four (4) years and ten (10) months, or a total of Nine Thou-

sand Five Hundred Thirty and 56/100 Dollars (\$9,530.56).

## XXI.

That according to the provisions of the said contract hereinbefore referred to, executed on November 1, 1934, the plaintiff was, and is, entitled to receive such employment, with compensation, from the defendants throughout his entire life or until he should reach the age of 65 years; that on the 25th day of March, 1941, the plaintiff was thirty-seven (37) years of age, and had an expectancy of life of 30.35/100th years; that he had an expectancy of 28 years before reaching the age of sixty-five (65) years; that by virtue of such contract he was entitled to employment at the said going rate of wages of Six and 32/100 Dollars (\$6.32) per 8-hour day for six (6) days a week for a period of twenty-eight (28) [8] years; that by virtue of such suspension, dismissal and discharge plaintiff has been deprived of said employment to his damage in the sum of Fifty-Five Thousand Two Hundred Eleven and 52/100 Dollars (\$55,211.52), in addition to all damages accrued to March 25, 1941.

## XXII.

That plaintiff herein and the Brotherhood Carmen of America have repeatedly, since the said suspension and discharge, appealed to the defendants herein to restore the plaintiff herein to his employment and to compensate him for time so lost because of such suspension and discharge but the defendants herein, at all times, have failed and re-



fused, and continue to fail and refuse, to so compensate the plaintiff and restore his employment.

### XXIII.

That the defendant William Morley was at all times herein mentioned general Foreman for the defendant corporations at their railroad shop in the City of Las Vegas, Clark County, Nevada, and he is the person who, as Agent of the said defendant corporations, made the decision to so wrongfully and without cause, and did so cause the discharge and dismissal of the plaintiff as aforesaid.

Wherefore, the plaintiff prays judgment against the defendants, and each of them:

1. For the sum of Sixty-four Thousand Seven Hundred Forty-two and 08/100 Dollars (\$64,742.08), together with interest at the rate of seven percent per annum (7%) on the said sum from the 25th day of March, 1941, until paid;

2. For the plaintiff's costs herein and such other and further relief as to the Court may seem meet and proper.

HAM & TAYLOR

By /s/ RYLAND G. TAYLOR

Attorneys for Plaintiff.

Complaint filed March 31, 1941, Lloyd S. Payne, Clerk, by Jean Purdue, Deputy. Verified by Plaintiff.

No. 160 U. S. Dist. Court, Dist. Nevada. Filed May 7, 1941. O. E. Benham, Clerk. By O. F. Pratt, Deputy.

[Endorsed]: Filed March 31, 1942 [9]

[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated by and between the parties hereto and their respective counsel that the Supplement to Complaint, a copy of which is hereunto annexed, may be filed in the above entitled action. It is further stipulated that the matters in said Supplement to Complaint be, and the same hereby are deemed denied by the defendants.

Dated this 19th day of April, 1945.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff

LEO A. McNAMEE, Esq., and

FRANK McNAMEE, Jr., Esq.,

Attorneys for Defendants

By LEO A. McNAMEE

[Endorsed]: Filed April 21, 1945. [10]

---

[Title of District Court and Cause.]

### SUPPLEMENT TO COMPLAINT

Comes now the plaintiff, pursuant to Stipulation, and as and for his supplement to his Complaint herein, adds to the said Complaint Paragraph XXA and alleges:

XXA.

That since the 25th day of March, 1941, and including the 19th day of March, 1945, the plaintiff herein has been deprived of compensation and wages as a result of such suspension and dismissal to his damage in the sum of \$7,849.00.

Wherefore, Plaintiff prays judgment according to the prayer of his original Complaint herein.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff

Receipt of copy of the above and foregoing Supplement to Complaint admitted this 19th day of April, 1945.

LEO A. McNAMEE

Attorney for Defendants.

[Endorsed]: Filed April 21, 1945. [11]

---

[Title of District Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO  
THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA

The Petition of Union Pacific Railroad Company, a corporation, Los Angeles & Salt Lake Railroad Company, a corporation, and William Morley, above named, respectfully represents to this Honorable Court:

I.

That the true name of the Defendant, William

Morley, is Willard T. Morley, instead of William Morley as alleged in Plaintiff's Complaint herein.

## II.

That the above entitled action has been brought in this Court and is now pending therein, and at the time this Petition was filed the time within which the Defendants are required to answer or otherwise plead has not expired and will not so expire until April 11, 1941.

## III.

That said action is of a civil nature, being an action to recover damages for an alleged breach of contract. Said action is one over which the United States District Courts are given jurisdiction, as will appear from the allegations of this Petition and from the Complaint on file herein. [12]

## IV.

The value of the matter in controversy in this action is in excess of \$3,000.00, exclusive of interest and costs, as appears from the allegations of Plaintiff's Complaint on file herein, wherein Plaintiff prays for judgment against the Defendants for the sum of \$64,724.08.

## V.

The controversy in said action is, and at the time of the commencement of said action was, entirely between citizens of different states, in that Union Pacific Railroad Company, a corporation, one of your Petitioners, was at the time of the commencement of said action, and still is, a corporation duly organized and existing under and by virtue of the laws of

the State of Utah, and is a citizen and resident of said State of Utah, and is not a citizen or resident of the State of Nevada. That Los Angeles and Salt Lake Railroad Company, a corporation, one of your petitioners, was at the time of the commencement of said action, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and is a citizen and resident of the State of Utah, and is not a citizen or resident of the State of Nevada. That W. L. Olive, Plaintiff, in said action, was at the commencement of said action, and still is, a citizen and resident of the State of Nevada.

## VI.

Your Petitioners aver that, as hereinafter more fully shown, the Plaintiff in this cause has improperly and fraudulently joined as Defendant in said cause the said Union Pacific Railroad Company, a corporation, a citizen and resident of the State of Utah, Los Angeles & Salt Lake Railroad Company, a corporation, a citizen and resident of the State of Utah, and William Morley, whose true name is Willard T. Morley, a citizen and resident of the State of Nevada; and that said William Morley, whose true name is Willard T. [13] Morley, is not a real Defendant or paper defendant, and his being joined as a Defendant with your Petitioners, the Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, in this cause was a mere sham and pretext

on the part of Plaintiff, and was done solely to prevent a removal of this cause by your Petitioners, Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, to the District Court of the United States, in and for the District of Nevada.

## VII.

Your Petitioners further state that the following facts are alleged in Plaintiff's Complaint as constituting his cause of action against these Defendants, to-wit:

(a) That for more than ten years immediately prior to January 1, 1936, Plaintiff had been employed jointly by the Defendant, Los Angeles & Salt Lake Railroad Company, and the Defendant, Union Pacific Railroad Company, as a car repair man and Car Inspector, at the Defendants' shop at Las Vegas, Nevada. That on November 1, 1934, while so employed, Plaintiff was a member of the labor organization known as and called the "Brotherhood Railway Carmen of America," and on said last mentioned date while Plaintiff was such a member of said Brotherhood and employed by the Defendant corporations, said Brotherhood was then the recognized and authorized bargaining agent for said men then employed by said Defendant Railroad Companies, and on said last mentioned date said Brotherhood entered into an agreement, for the benefit of all its members, with the Defendant Railroad Companies, which agreement set forth the respective rights and duties of said corporations and said



Brotherhood and the individual members thereof with respect to the employment of the members of said Brotherhood.

(b) That said agreement provides, among other things, to [14] the effect that no employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employee will be apprised of the precise charge against him, and shall have a reasonable opportunity to secure witnesses and have the right to be represented by counsel. If it be found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal. No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employee be discharged for any cause without first being given an investigation. That said agreement at the time of the commencement of this action, and ever since November 1, 1934, has been in full force and effect.

(c) That on May 25, 1936, the Plaintiff, while employed by the Defendant Railroad Companies, was unlawfully and without cause, suspended from service and from such employment, and remained suspended from service until the 20th day of August, 1936, at which time the Plaintiff was, unlaw-

fully and without cause, by said Defendants, dismissed and discharged from service of the said Defendants.

(d) That prior or incidental to said suspension, dismissal or discharge, Plaintiff was not afforded a fair or any hearing by a designated officer of the Defendants, or either of them, and was not apprised of the precise charge, or any charge, against him by the Defendants, or either of them; and was not given an investigation; that prior to the time of said suspension, dismissal and discharge, and ever since, the Plaintiff has presented himself for employment to the Defendants, agreeably with the provisions of said [15] contract, and that at all times said offer was made in good faith and Plaintiff was ready, able and willing to perform his services, but Defendants failed and refused to employ or reinstate Plaintiff, and have failed and refused to compensate him for wages and time lost since said dismissal and discharge, and that he was not afforded an opportunity to secure the presence of witnesses in his behalf, nor afforded the right to be present himself or with counsel, relating to the causes for suspension or discharge. That Plaintiff, at the time of said discharge and prior there to, was earning regularly the sum of \$6.32 per eight-hour day for six days a week for each and every week; that said sum was the regular going wage for like employment. That since the wrongful suspension and discharge aforesaid, the Plaintiff has, to March 25, 1941, been deprived of compensation, as a result of said discharge, for a period of four years and ten months, or a total of \$9,-



530.56, and that according to the provisions of said contract, Plaintiff is entitled to receive such employment, with compensation, throughout his entire life or until he should reach the age of sixty-five years, and that by reason of said discharge Plaintiff has been deprived of said employment to his damage in the sum of \$55,211.52, in addition to the damages accrued to March 25, 1941.

(e) That the Plaintiff and the Brotherhood Car-men of America have repeatedly, since said suspension and discharge, appealed to Defendants to restore Plaintiff to his employment and to compensate him for time lost because of such suspension and discharge, but Defendants have failed and refused and continue to fail and refuse to compensate Plaintiff and restore his employment.

(f) That the Defendant, William Morley, whose true name is Willard T. Morley, was at all times in the Complaint mentioned, General Foreman for the Defendant corporations at their railroad shop in the City of Las Vegas, Clark County, Nevada, and that he [16] is the person who, as agent of the Defendant corporation, made the decision which caused the discharge and dismissal of Plaintiff.

### VIII.

That your Petitioners aver that the following statement, among others, is untrue and was known to the Plaintiff to be untrue at the time the Complaint was prepared and filed, and was set forth and alleged in said Complaint for the sole purpose of

defrauding the Court and these Defendants and so as to defeat and prevent the removal of this action to the United States District Court in and for the District of Nevada, to-wit:

“That the Defendant William Morley was at all times herein mentioned General Foreman for the defendant corporations at their railroad shop in the City of Las Vegas, Clark County, Nevada, and he is the person who, as Agent of the said defendant corporations, made the decision to so wrongfully and without cause, and did so cause the discharge and dismissal of the plaintiff as aforesaid.”

Also the statement to the effect that the Plaintiff was by the Defendant, William Morley, whose true name is Willard T. Morley, suspended, dismissed and discharged from the service of the Union Pacific Railroad Company, a corporation, and the Los Angeles & Salt Lake Railroad Company, a corporation; also the statement to the effect that Plaintiff, at the time of his alleged suspension, dismissal and discharge, and ever since said suspension, dismissal and discharge, presented himself for employment to said Defendant, William Morley, whose true name is Willard T. Morley; and also the statement to the effect that the Defendant, William Morley, whose true name is Willard T. Morey, failed and refused, and continued to fail and refuse to restore Plaintiff to his employment and to compensate Plaintiff; and also the statement to the effect that the Defendant, William Morley, whose true name is Williard T. Morley, failed and refused to employ or reinstate

Plaintiff and failed or refused to compensate him for services and time lost since said dismissal and discharge; and also the statement to the effect [17] that Plaintiff and the Brotherhood Carmen of America appealed to the Defendant, William Morley, whose true name is Willard T. Morley, to restore Plaintiff to his employment and to compensate him for his time lost because of such suspension and discharge.

In this connection your petitioners affirmatively aver:

That for a long time prior to January 31, 1936, the Defendant, William Morley, whose true name is Willard T. Morley, was employed by Defendant, Los Angeles & Salt Lake Railroad Company, a corporation, as Enginehouse Foreman at Las Vegas, Clark County, Nevada, and that ever since January 1, 1936, said Defendant, William Morley, whose true name is Willard T. Morley, has been employed by the Defendant, Union Pacific Railroad Company, a corporation, as Enginehouse Foreman at Las Vegas, Clark County, Nevada; that the Plaintiff herein was never at any time under the employ of the Defendant, William Morley, whose true name is Willard T. Morley; that on the 25th day of May, 1936, the Defendant, William Morley, whose true name is Willard T. Morley, had no authority or jurisdiction whatsoever to suspend the Plaintiff from his employment by the Defendant corporations, and on the 20th day of August, 1936, the Defendant, William Morley, whose true name is Willard T. Morley, had no au-

thority or jurisdiction whatsoever to dismiss or discharge or to cause to be dismissed or discharge from the service of the said Defendant Railroad Companies, or either of them, the said Plaintiff. That said Defendant, William Morley, whose true name is Willard T. Morley, at no time since the 20th day of August, 1936, has had the jurisdiction or authority to employ or reinstate the said Plaintiff in the service of the Defendant Railroad Companies, or either of them, but, on the contrary, authority and jurisdiction to suspend, discharge, employ, re-employ and reinstate the said Plaintiff, W. L. Olive, in the service of the Defendant Railroad Companies, was vested in officers of said Defendant corporations other than the defendant, William Morley, whose [18] true name is Willard T. Morley.

#### IX.

That the Defendant, William Morley, whose true name is Willard T. Morley, never was and is not now either a necessary or proper party defendant to this cause.

#### X.

Your petitioners present herein a good and sufficient bond, as provided by the Statutes in such cases, that they will enter in the District Court of the United States, for the District of Nevada, within thirty days from the date of filing this Petition, a certified copy of the record in said action, and that they will pay all costs which may be awarded by said United States District Court in case the said Court shall hold that this action was wrongfully or improperly removed thereto.

## XI.

That prior to the filing of this Petition and said Bond for removal of this cause, written Notice of Intention to file the same, together with a copy of the Removal Bond, was given to the Plaintiff, as required by law.

Wherefore, your Petitioners pray that this Court proceed no further herein, excepting to make an order accepting the Bond presented herewith and directing that a transcript of the record herein be made for filing in the United States District Court for the District of Nevada.

UNION PACIFIC RAILROAD COM-  
PANY, LOS ANGELES & SALT LAKE  
RAILROAD COMPANY,

WILLIAM MORLEY (whose true name  
is Willard T. Morley),  
Petitioners.

By LEO A. McNAMEE,  
FRANK McNAMEE, JR.,  
Attorneys for Petitioners. [19]

State of Nevada,  
County of Clark—ss.

Willard T. Morley, being first duly sworn, deposes and says: That he is one of the Defendants and one of the Petitioners in the foregoing Petition; that the Defendant, Union Pacific Railroad Company, one of the Petitioners in the foregoing Petition, is a corporation; that the Defendant, Los An-



geles & Salt Lake Railroad Company, one of the Petitioners in the foregoing Petition, is a corporation; that affiant makes this verification for and on behalf of himself and his co-defendants; that affiant has read the foregoing Petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief and as to those matters he believes it to be true.

WILLARD T. MORLEY.

Subscribed and sworn to before me this 8th day of April, 1941.

[Seal]

DALTON H. BUCK,  
Notary Public.

State of Nevada,  
County of Clark—ss.

Leo A. McNamee, being first duly sworn, deposes and says:

That he is one of the Attorneys for the Defendants Los Angeles & Salt Lake Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation; that each of said Defendant corporations is a corporation of the State of Utah, and that all the officers of said Defendant corporations reside outside the County of Clark, State of Nevada, where their said Attorneys reside, and are absent from the said County of Clark, State of Nevada; that affiant has read over the foregoing Petition and that all of the facts therein stated are not within his

knowledge, but that he is informed and believes the same to be true and upon such information and belief states that the same is true.

LEO A. McNAMEE.

Subscribed and sworn to before me this 8th day of April, 1941.

[Seal]                      DALTON H. BUCK,  
Notary Public.

Receipt of a copy of the foregoing Petition this 9 day of April, 1941, is hereby admitted.

(s) HAM & TAYLOR,  
Attorneys for Plaintiff.

Filed May 7th, 1941.  
O. E. BENHAM,  
Clerk.

By M. R. GRUBIC,  
Deputy.

[Endorsed]: Filed April 9, 1941. [20]

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[Title of District Court and Cause.]

NOTICE OF HEARING ON PETITION FOR  
REMOVAL

To: W. L. Olive, Plaintiff above named, and to  
Messrs. Ham & Taylor, Esqs., his Attorneys:

You and Each of You, will please take notice that on Wednesday, the 9th day of April, 1941, at 1:50 o'clock P.M., or as soon thereafter as counsel may

be heard, at the Court room of the County Court House, in the City of Las Vegas, Clark County, Nevada, the Defendants above named will move the above entitled Court to make an order removing this cause from this Court to the United States District Court for the District of Nevada.

Dated this 9th day of April, 1941.

LEO A. McNAMEE,

FRANK McNAMEE, Jr.

Receipt of a copy of the foregoing Notice this 9th day of April, 1941, is hereby admitted.

HAM & TAYLOR,

Attorneys for Plaintiff.

Filed May 7th, 1941.

O. E. BENHAM,

Clerk.

By M. R. GRUBIC,

Deputy.

[Endorsed]: Filed Apr. 9, 1941. [21]

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[Title of District Court and Cause.]

### BOND ON REMOVAL

Know All Men by These Presents:

That Continental Casualty Company, a corporation of the State of Indiana, authorized to do a general surety business in the State of Nevada, as Surety, is held and firmly bound unto W. L. Olive, in the full and just sum of Five Hundred (\$500.00) Dollars, for the payment of which well and truly to



be made, said Surety binds itself, its successors and assigns, firmly by these presents.

The condition of the above obligation is such that,

Whereas, Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, Defendants in the above entitled action, have petitioned, or are about to petition the above entitled Court for the removal of a certain cause therein pending wherein W. O. Olive is the Plaintiff, and the said Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, as well as one William Morley, are defendants, to the District Court of the United States for the District of Nevada, for further proceedings on grounds in said Petition set forth.

Now, Therefore, if the said Union Pacific Railroad Company and Los Angeles & Salt Lake Railroad Company shall enter in such District Court of the United States within thirty (30) days from the date of filing said Petition, a certified copy of the record in such suit and shall well and truly pay all costs that may be awarded by the District Court of the United States if such District Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, said Continental Casualty Company has caused this Undertaking to be executed and its corporate seal [22] affixed by its offi-

cer thereunto duly authorized, this 4th day of April, 1941.

CONTINENTAL CASUALTY  
COMPANY.

[Seal] By N. ENLUND,  
Its Attorney in Fact.

Countersigned:

L. A. SPRINGETT,  
Resident Agent, Box 402, Elko,  
Nevada.

The foregoing Bond is hereby approved this 9th day of April, 1941.

GEORGE E. MARSHALL,  
District Judge.

Receipt of a copy of the foregoing Bond this 9th day of April, 1941, is hereby admitted.

HAM & TAYLOR,  
Attorneys for Plaintiff.

Filed May 7th, 1941. O. E. Benham, Clerk. By  
M. R. Grubic, Deputy.

[Endorsed]: Filed Apr. 9, 1945. [23]

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[Title of District Court and Cause.]

ORDER FOR REMOVAL

This cause coming on for hearing upon the Petition and Bond of the Defendants for an Order transferring this cause to the United States District Court,

for the District of Nevada, and it appearing to the Court that said Defendants have filed their petition for such removal in due form of law and that said Defendants have filed their Bond, duly conditioned, with good and sufficient surety, as provided by law, and that said Defendants have given Plaintiff due and regular notice thereof, and it appearing to the Court that this is a proper cause for removal to the United States District Court, for the District of Nevada, Now, Therefore, said Petition and Bond are hereby accepted, and

It Is Hereby Ordered and Adjudged that this cause be, and it is hereby, removed to the United States District Court, for the District of Nevada, and the Clerk is hereby directed to make up the record in said cause for transmission to the Court forthwith.

Done in open Court this 9th day of April, 1941.

GEORGE E. MARSHALL,  
District Judge.

Filed May 7th, 1941. O. E. Benham, Clerk. By M. R. Grubic, Deputy.

[Endorsed]: Filed April 9, 1941. [24]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE WITH RECORD

State of Nevada,  
County of Clark—ss.

I, Lloyd S. Pane, County Clerk of said County of Clark, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for Clark County, do hereby certify the foregoing to be the full, true and correct original record, and the whole thereof, in the above entitled suit heretofore pending in said District Court, being the suit numbered 11746, wherein W. L. Olive is the Plaintiff, and Union Pacific Railroad Company, a corporation, Los Angeles & Salt Lake Railroad Company, a corporation, and William Morley, are defendants, said record consisting of the Complaint filed by said Plaintiffs in said suit on the 31st day of March, 1941, the Summons, together with the return thereon, filed March 31, 1941, by the Plaintiff, the Petition for Removal of said suit to the District Court of the United States for the District of Nevada, the Bond for Removal, the Notice of Hearing on Petition for Removal, all filed by said Defendants in said suit on the 9th day of April, 1941, the Order for Removal made at the time of the presentation of said Petition and Bond to the Judge of the District Court, to-wit, on April 9, 1941, and entered of record in said suit on the 9th day of April, 1941, as appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and official seal at my office, in said County of Clark, this 28th day of April, 1941.

[Seal]                      LLOYD S. PAYNE,  
County Clerk and Ex-Officio Clerk of the District  
Court of the Eighth Judicial District of the  
State of Nevada, in and for the County of Clark.

Filed May 7th, 1941. O. E. Benham, Clerk. By  
M. R. Grubic, Deputy. [25]

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[Title of District Court and Cause.]

### ANSWER

Comes now the Defendants above named and answer Plaintiff's Complaint as follows:

### FIRST DEFENSE

Defendants admit the allegations contained in paragraphs I, III, IV, VI, XI and XII of said Complaint.

Defendants admit the allegations contained in paragraph II thereof, except that defendants allege that the true name of said defendant is Willard T. Morley.

Defendants deny the allegations contained in paragraph V of said Complaint.

Defendants deny the allegations contained in paragraph VII of said Complaint, except that Defendants admit that for a period of more than ten years

immediately prior to January 1, 1936, to-wit: Since May 9, 1925, Plaintiff had been employed by Defendant Los Angeles & Salt Lake Railroad Company as a car repairman and Car Inspector at its yards at Las Vegas, Nevada, and in this connection Defendants allege that at the time of Plaintiff's said employment it was agreed between the plaintiff and defendant, Los Angeles & Salt Lake Railroad Company, among other things, as follows:

(a) That no permanent employment was contracted for and that the term of said employment was subject to the decision of said Defendant;

(b) That plaintiff during his employment, would abide and be governed by certain rules and regulations promulgated [26] by said defendant, then in force or which thereafter might be adopted, which included said defendants, Hospital Department regulations and said defendant's Rules Governing the Determination of Physical Qualifications of Employees.

Defendants are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph VIII of said Complaint and therefore deny the allegations in said Paragraph contained.

Defendants are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph IX of said Complaint and therefore deny all of the allegations therein contained, except that Defendants admit and allege that on November 1, 1934, the Brotherhood Railway Carmen of



America was recognized and authorized bargaining agency for the class and craft of employees collectively, of said Defendant Railroad Companies, respectively, commonly known as carmen.

Defendants deny all of the allegations contained in paragraph X of said Complaint, except that Defendants admit that on the first day of November, 1934, said Brotherhood Railway Carmen of America entered into an agreement with Los Angeles & Salt Lake Railroad Company and Union Pacific Railroad Company, which said agreement set forth the respective rights and duties concerning rates of pay, rules and working conditions of said Defendant Railroad Companies and the class or craft of their employees collectively.

Defendants deny all of the allegations contained in paragraph XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, and XXIII of said Complaint.

## SECOND DEFENSE

### I.

Defendants allege that for more than ten years immediately prior to January, 1936, Defendant Los Angeles & Salt Lake Railroad Company, a corporation, was engaged in [27] transporting passengers and property for hire, as a common carrier by railroad from Salt Lake City, in the State of Utah, through the County of Clark, in the State of Nevada, to the City of Los Angeles, in the State of California.



## II.

That on May 9, 1925, Plaintiff was engaged by Defendant Los Angeles & Salt Lake Railroad Company, as a carman in its yards at Las Vegas, Nevada.

That on February 25, 1934, the Plaintiff while so in the employ of said Defendant, Los Angeles & Salt Lake Railroad Company, and in the course of said employment and while working upon and about one of said Defendant's passenger cars which had then and there been assigned to one of said Defendant's regular passenger trains to be hauled from Las Vegas, Nevada, to Salt Lake City, Utah, fell from the top of said car and was injured, to-wit, his left arm was fractured. That by reason of said injury, Plaintiff was physically disabled and unable to perform the duties of car man from the time of said injury until May 28, 1938.

## III.

That on May 4, 1935, the Plaintiff, in consideration of the sum of \$5,000.00, paid to him, executed and delivered to Defendant Los Angeles & Salt Lake Railroad Company a release of all claims, in writing, which is in the words and figures following:

“Form 222

Union Pacific System

Union Pacific Railroad Company.

Oregon Short Line Railroad Company.

Oregon-Washington Railroad & Navigation Company.

Los Angeles & Salt Lake Railroad Company.

Saratoga & Encampment Valley Railroad Company.

The St. Joseph and Grand Island Railway Company.

St. Joseph Terminal Railroad Company.

Draft No. 3978-MRC. [28]

### RELEASE OF ALL CLAIMS

Received of Los Angeles & Salt Lake Railroad Company Five Thousand Dollars (\$5,000.00).

In consideration thereof, I hereby release Los Angeles & Salt Lake Railroad Company and all other companies, partnerships and persons from all claims or causes of action that exist or may hereafter accrue, for damages for any and all personal injuries, including possible unknown injuries, and for complications arising from such injuries or treatment thereof; for loss of services; for medical or other expenses; and for loss and damage to property; growing out of an accident occurring on or about twenty fifth day of February, 1935, at or near Las Vegas, Nevada—resulting in personal injuries to me while a Car Inspector—

The above amount is the full consideration for this settlement, and no promise or contract of future employment has been made.

I Have Read the Foregoing Receipt and Release and Fully Understand the Same. I have read the foregoing receipt and release and fully understand the same.

Dated Las Vegas, Nevada, May 4th, 1935.

WILLARD L. OLIVE

Las Vegas, Nevada

May 4th, 1935

Witnesses: Mary Carol Melton, C. C. Boyer, Jr.,  
John R. Hamphill, M. R. Clark. 5/4/35.

#### IV.

That on May 25, 1938, Plaintiff was notified by Defendant Union Pacific Railroad Company that if he could pass the physical examination required of car men that he would be returned to work as car man in the yards at Las Vegas.

#### V.

That thereafter, to-wit, on May 28, 1938, Plaintiff passed said physical examination and thereafter was notified to that effect, but said Plaintiff refused to return to his said work, except upon the condition that Defendants compensate Plaintiff for time lost since May, 1935.

#### THIRD DEFENSE

That Defendant Los Angeles & Salt Lake Railroad Company and the Defendant Union Pacific Railroad Company are each corporations organized and existing under and by virtue of the laws [29] of the State of Utah. That prior to August 20, 1936, each of said Defendant corporations filed a certified copy of its Articles of Incorporation, and a certified copy of all of the Amendments thereto, in the office of the Secretary of State of the State of

Nevada, and ever since prior to August 20, 1936, these Defendant corporations have each kept on file in the office of the Secretary of State of the State of Nevada a certified copy of its Articles of Incorporation, and a certified copy of all of the amendments thereto. That prior to August 20, 1936, said Defendant corporations also each filed a certified copy of its Articles of Incorporation, and of all amendments thereto, as certified by the Secretary of State of the State of Nevada, in the office of the County Clerk of the County of Clark, State of Nevada, in which County the principal place of business of each of said Defendant corporations in the State of Nevada, is located.

That prior to August 20, 1936, each of said Defendant corporations appointed, and have ever since kept and maintained in the State of Nevada, a resident agent upon whom process may be served.

That on or before the 1st day of July of each of the years 1936, 1937, 1938, 1939, 1940, each of the Defendant corporations filed with the Secretary of State of the State of Nevada, a list of its officers and of its Directors of, and a designation of its resident agent, in the State of Nevada, and a certificate of acceptance signed by its resident agent so designated, which said list of officers and designation of resident agent was certified by one of its officers, and upon the filing of each of said lists, paid to the said Secretary of State a fee of \$5.00.

## II.

That Plaintiff's cause of action is upon a con-

tract obligation of liability, not founded upon an instrument in [30] writing and that Plaintiff's said cause of action did not accrue within four years from March 31, 1941, the date of the commencement of this action. Wherefore, Plaintiff's cause of action has become, and is, completely barred, by virtue of that portion of Section 8524, Nevada Compiled Laws 1929, reading as follows: "Actions other than those for the recovery of real property, can only be commenced as follows: . . . . . Within four years: . . . . . 3. An action upon a contract, obligation or liability, not founded upon an instrument in writing."

LEO A. McNAMEE

Las Vegas, Nevada .

FRANK McNAMEE, Jr.

Las Vegas, Nevada

Attorneys for Defendants.

Receipt of a copy of the foregoing Answer this 6 day of June, 1941, is hereby admitted.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff.

[Endorsed]: Filed June 9, 1941. [31]

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[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff herein, pursuant to the annexed Stipulation, and leave of Court, hereby

amends his Complaint by substituting for paragraph X of the said Complaint, the following paragraph:

X.

That on the first day of November, 1934, the said Brotherhood Railway Carmen of America entered into an agreement in writing, a copy of which said agreement is hereunto annexed, marked "Exhibit A," and made a part hereof, for the benefit of all members of said Brotherhood Railway Carmen of America with the Los Angeles & Salt Lake Railroad Company and the Union Pacific Railroad Company, which said agreement set forth the respective rights and duties of the said corporations and the said Brotherhood Railway Carmen of America and the individual members thereof with respect to the employment of the members of the said Brotherhood Railway Carmen of America.

Wherefore, plaintiff prays judgment according to the [32] prayer of his original Complaint on file herein.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff.

EXHIBIT "A" ATTACHED TO AMENDMENT  
TO PARAGRAPH X OF COMPLAINT

Rule 22: In case an employe is unavoidably kept from work he will not be discriminated against. An employe detained from work on account of sickness or for any other good cause, shall notify his foreman as early as possible.



Rule 23: Employees who have given long and faithful service in the employ of the company, and who have become unable to handle heavy work to advantage, will be given preference of such light work in their line as they are able to handle.

Rule 38: No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employee be discharged for any cause without first being given an investigation.

Rule 45: Employees injured while at work are required to make a detailed written report of the circumstances of the accident just as soon as they are able to do so after receiving medical attention. Proper medical attention shall be given at the earliest possible moment and employees shall be permitted to return to work just as soon as they are able to do so, pending final settlement of the case, provided, however, that such injured employees remaining away from work after recovery shall not be held to be entitled to compensation for wage loss after they are able to return to work. All claims for personal injuries shall be handled with the Personal Injury Claim Department.

(Exhibit "A" Is Identical With Plaintiff's Exhibit 2 introduced in evidence.)

[Endorsed]: Filed Feb. 19, 1945. [34]



[Title of District Court and Cause.]

ANSWER TO AMENDMENT TO COMPLAINT

Come now the Defendants above named and answer Plaintiff's Amendment to Complaint, as follows:

I.

Defendants deny all of the allegations contained in paragraph X of said Complaint, as amended pursuant to Stipulation dated February 16, 1945, except that Defendants admit that on the first day of November, 1934, said Brotherhood of Railway Carmen of America entered into an agreement in writing, a copy of which is annexed to said Amendment to Complaint, marked Exhibit "A," and made a part thereof, with Los Angeles & Salt Lake Railroad Company and Union Pacific Railroad Company, which said Agreement set forth the respective rights and duties concerning rates of pay, rules and working conditions of said Defendant Railroad Companies and the class or craft of their employees collectively.

LEO A. McNAMEE

FRANK McNAMEE, Jr.

By LEO A. McNAMEE

Attorneys for Defendants.

Receipt of a copy of the foregoing Answer to Amendment to Complaint, this 21 day of February, 1945, is hereby admitted.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 26, 1945. [35]

[Title of District Court and Cause.]

### MOTION TO STRIKE

Comes now the Plaintiff in the above entitled Court and cause, as of the 5th day of March, 1945, and moves the Court for an order striking from the Answer in the above entitled Court and cause (a) Paragraph III of the Second Defense and (b) the entire Third Defense, upon the ground and for the reason that the said matter is immaterial and does not constitute a defense or defenses and the same is surplusage.

Dated this 24 day of February, 1945.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff.

Receipt of a copy of the foregoing Motion is admitted this 24 day of February, 1945.

McNAMEE & McNAMEE

By LEO A. McNAMEE

Attorneys for Defendants.

In the District Court of the United States,  
In and For the District of Nevada

No. 160

Before: Hon. Ben Harrison, Judge, Presiding.

W. L. OLIVE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, LOS ANGELES & SALT LAKE  
RAILROAD COMPANY, a corporation, and  
WILLARD T. MORLEY,

Defendants.

### TRIAL

Be It Remembered, That the above-entitled cause came on regularly for trial before the Court, sitting with a jury, on Monday, the 19th day of March, 1945, at 10:00 o'clock A.M., at Las Vegas, Nevada, Hon. Ben Harrison, Judge, presiding.

Appearances: Ham & Taylor, by Ryland G. Taylor and A. W. Ham, Attorneys for Plaintiff. McNamee & McNamee, by Leo McNamee, Attorneys for Defendants.

The following proceedings were had:

Opening statements by respective counsel.

The Court: So we may clarify the atmosphere—there has been some reference to connection between the Union Pacific and Salt [48] Lake Railroad—

Mr. McNamee: That is not a question in the case, your Honor.

The Court: It is just a question whether or not this man is improperly discharged. So that is the question before the jury, and if so, the amount due him.

Mr. Taylor: And I think it is agreed if there is a sum due, it is due from the Union Pacific, by virtue of its succeeding to the Los Angeles & Salt Lake Railroad. Is that right?

Mr. McNamee: That is correct.

Mr. Taylor: I have a paper entitled in this court, "Request for Admission of Facts," served and signed the 9th day of February, 1945, and request that that be marked Plaintiff's Exhibit 1 and introduced into evidence.

Mr. McNamee: No objection.

Clerk: Plaintiff's 1.

Mr. Taylor: I have here a document entitled, "Schedule of Rules Governing the Working Conditions of Employees" etc., of the Union Pacific System, and request that that be marked Plaintiff's Exhibit 2 and introduced into evidence.

Mr. McNamee: No objection.

The Court: So marked.

Clerk: Plaintiff's 2.

Mr. Taylor: I desire to read from these exhibits.

The Court: May it be stipulated, gentlemen, these exhibits, [49] either party may read any part they wish to call the jury's attention to. Neither one wants to read the whole book.

Mr. McNamee: As I understand, Exhibit 1 is "Request for Admission of Facts."

Mr. Taylor: That is right.

Mr. McNamee: And Exhibit 2 is the contract?

Mr. Taylor: That is right.

Mr. McNamee: That is part of Exhibit 1?

Mr. Taylor: No, Exhibit 2 is the book of rules.

The Court: Do you wish to withdraw your Exhibit 2 and attach it to Exhibit 1?

Mr. Taylor: I think the way it is, your Honor. It has been offered and admitted now as Exhibit 1.

The Court: Any part of the admissions you wish to read to the jury at this time?

Mr. Taylor: At this time I believe not, sir. I think we can forego that until the argument, your Honor.

Mr. McNamee: At this time, if your Honor please, the defendant has certain admissions and I wondered if we should put ours in now?

The Court: Let the plaintiff finish his case first.

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MR. W. L. OLIVE,

the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, Mr. Olive? [50]

A. Willard L. Olive.

Q. You are the plaintiff in this action?

(Testimony of W. L. Olive.)

A. Yes.

Q. How old are you? A. Forty-four.

Q. What date?

A. I will be 44 the 11th of November this year.

Q. Then you are 43 years old at this time?

A. Yes.

Q. When did you start to work in the railroad business, or when did you start to work?

A. Just after I left high school, I think.

Q. How old were you then?

A. About 16.

Q. Where were you?

A. At Pocatello, Idaho.

Q. What character of work did you start in to do?

A. You mean the various branches I have worked in?

Q. Anything that you did during your life?

A. I started out as office boy?

Q. For whom?

A. For the Union Pacific, and then I went into the stationary department.

Q. For whom?

A. For the railroad, for the Union Pacific; then the store department for the Union Pacific and then for the car shop store [51] department for the Union Pacific; then I transferred to the car department as a car inspector. I started out as a repair man and worked my way up to a car inspector.

Q. Tell the years during which you worked and the places.

(Testimony of W. L. Olive.)

A. I believe Pocatello and Las Vegas are the only two places I worked for the Union Pacific.

Q. How long did you work in Pocatello?

A. From 1916 to about 1921.

Q. When did you come to Las Vegas and start to work for the Los Angeles & Salt Lake?

A. I came to Las Vegas in 1923 and started to work in the store department here and from there transferred into the car department I think—there was a little lapse of service there, but I think 1925 was my shop seniority date.

Q. Then you worked continuously for the Los Angeles & Salt Lake car department up to 1934, is that true?

A. That is true.

Q. And at that time you went out of the service for a period, is that right?

A. Yes.

Q. I mean by going out of the service, you actually left the shop for a while, is that true?

A. That is true.

Q. What was the occasion for your being off from your work?

A. I was injured by a fall from a car that was improperly spotted at the depot platform. [52]

Q. And were you given leaves of absences during the interim during which you were off?

A. Yes, sir.

Q. There was, I believe, later on a settlement made for your injury, wasn't there?

A. Yes, sir.

Q. But in the course of that settlement your employment with the railroad was not terminated?



(Testimony of W. L. Olive.)

A. No.

Q. You continued on to get your leave of absence and you continued to endeavor to restore your health so as to enable you to return to your employment, is that right? A. That is right.

Q. When, after that period during which you were away from work a while, when did you later report back for work?

A. I reported back for work December 18, 1935.

Q. Were you given employment at that time?

A. No, sir.

Q. What excuse, if any, was given you, what reason was given you, for not putting you to work, if any?

The Court: Let us find out who he talked to.

Mr. Taylor: Very well, sir, thank you.

Q. Who at that time, if any one, did you apply to to return to work?

A. Oh, my immediate superior was Mr. Maydahl.

Q. And tell what happened. [53]

A. He was the car foreman here at that time and he recommended that I be examined by a local doctor, which I did, and——

Q. Who was the local doctor?

A. Dr. Hale B. Slavin.

Q. And go ahead, tell what happened.

A. He passed me for my examination with the exception of a few points high blood pressure. However, he recommended that it would be a borderline case and told me to come back later.

Q. Did you go back later? A. I did.

(Testimony of W. L. Olive.)

Q. When was that? A. At various times.

Mr. Taylor: Excuse me. With permission of Court and counsel, this has been a long time ago and if he might be permitted to refresh his memory from notes he has, I would appreciate it.

Mr. McNamee: I have no objection if the notes were taken at the time.

Mr. Taylor: Well, they were made up later from memoranda.

The Court: Was the memorandum made at the time?

Mr. Taylor: Yes sir. This memorandum is made from correspondence and notes——

The Court: He has a right to refresh his memory.

A. There were so many dates that I can't remember them all, but I was examined January 3, 1935.

Q. Where at and with what result? [54]

A. In Salt Lake.

Q. Who examined you then?

A. The chief surgeon, Dr. Joseph Landenberger. He passed me for duty.

Q. When was that? A. January 3, 1935.

Q. Where was that at?

A. That was in Salt Lake City.

Q. And was there any subsequent examination?

The Court: You say he passed you?

A. Yes sir. Yes, he told me at the time to take a routine examination in Las Vegas from our local doctor, which I did. That was May 20, 1935.

(Testimony of W. L. Olive.)

Q. What was the result of that?

A. That was the same as the first examination I took from Dr. Slavin. He had a few points high blood pressure again.

The Court: In other words you didn't pass?

A. No sir.

Q. What was that answer?

A. Well, if I may elaborate it a little. He recommended that my case be considered a borderline case and told me to report later.

Q. Who was that, Dr. Slavin?

A. Dr. Slavin.

Q. On May 20, 1935? A. Yes sir. [55]

Q. He told you to report where?

A. Oh, if I can beg the Court's pardon here, I have made a mistake. My first examination was May 20, 1935, from Dr. Slavin and he advised me under the circumstances to take an extended trip and see if I couldn't build up my arm, which I did. Then on returning from this trip, I stopped in Salt Lake City and was examined by Dr. Landenberger on the date I gave you, October 8, 1936; then I was examined on November 20, 1935, here by Dr. Slavin.

Q. Pause there a minute. On October 8th Dr. Landenberger examined you? A. Yes.

Q. 1935? A. Yes.

Q. What were his findings?

A. He passed me for live track duty.

Q. What is that?

A. It means that you must be physically fit and

(Testimony of W. L. Olive.)

have good eyes and good hearing and be able to perform the work of car inspector.

Q. Physically in fine shape?

A. Yes sir.

Q. And he passed you at that time, is that true?

A. Yes sir.

Mr. McNamee: He passed you for not live truck duty, but dead truck duty, didn't he? [56]

A. No, live track duty. I was a car inspector. It was live track work.

Mr. McNamee: All right.

Q. (Mr. Taylor) Then what was done subsequent to that?

A. Then I was examined again on May 23, 1936, by Dr. Slavin and he held my two or three points blood pressure against me. However, at that time I was examined by a city physician, Dr. Balcomb here, who assured me my heart——

Mr. McNamee: I object to what Dr. Balcomb testified to.

The Court: Yes.

Q. What was done with Slavin's findings at that time, on May 23rd, wasn't it, that he examined you?

A. Yes sir. He held a few points high blood pressure——

The Court: In other words, he didn't pass you, isn't that correct?

A. I don't know how you determine it.

The Court: In other words, he didn't give you clearance to go back to work?

A. No.

(Testimony of W. L. Olive.)

Q. Did he tell you you could go back to work or your condition was such that you could go to work?

Mr. McNamee: Objected to——

The Court: He testified to the fact.

Mr. McNamee: I will withdraw the objection.

(Question read.)

Mr. McNamee: I object on the ground it is leading [57]

The Court: Well, it is leading, but I will let him answer just the same.

A. Dr. Slavin told me that he would recommend in writing that my case was a borderline case and again write to Dr. Landenberger in Salt Lake City, who was the chief surgeon.

Q. He recommended your return to service?

A. He seemed in favor of it.

The Court: I will strike that out as conclusion, "he seemed in favor it." That is his conclusion.

A. And I was examined again on October 22, 1937, by Schuler Fagen who was chief surgeon in Los Angeles, replacing Dr. Landenberger. That was October 22, 1937, and he passed me for live track duty. And then I was examined again on May 27, 1938, by the Union Pacific medical staff in Los Angeles and in the presence of witnesses of the B. R. C. of America, that is the Brotherhood of Railway Carmen, and was again passed for live track duty.

Q. Did you explain—that was May 27, 1938?

A. Yes sir.

(Testimony of W. L. Olive.)

Q. What happened on October 22, 1937? Wasn't that examination in Los Angeles, or was it?

A. Yes sir.

Q. And what happened in '37, October 22, 1937?

A. I was examined by Dr. Schuler S. Fagen and he passed me for live track duty.

Q. And were you examined at any time by independent medical men of your own, other than the company's doctors? [58]

A. Yes sir.

Q. Who examined you?

A. I was examined on May 23, 1936, by Dr. Balcolm.

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 3 a stipulation reading as follows:

"It Is Hereby Stipulated by and between the parties hereto and their respective counsel:

"That Dr. R. D. Balcolm is now and at all times hereinafter mentioned was a qualified physician and surgeon and on duty and in the practice of his profession at the Las Vegas Hospital in Clark County, Nevada.

"That if he were present and sworn to testify in this case, he would testify as follows:

"That on May 23, 1936, he made a physical examination of W. L. Olive, the plaintiff in this action, to determine his physical conditions. That at that time he found the plaintiff in normal health, with a blood pressure of 130. That his heart was

normal and sound and that he is physically qualified for any character of physical exertion.' "



(Testimony of W. L. Olive.)

“Dated this 19th day of March, 1945.

HAM & TAYLOR

RYLAND G. TAYLOR

Attorneys for Plaintiff.

LEO A. McNAMEE, Esq., and

FRANK McNAMEE, Esq.,

Attorneys for Defendant

By LEO A. McNAMEE.”

May that be admitted as Exhibit 3?

The Court: Exhibit 3.

Clerk: Plaintiff's 3.

Q. Now immediately following that did you get any further physical [59] examination—or, to refresh your memory, I direct your attention to a time when the railroad car came through—I don't know what to call that car—but they have doctors on it. Do you recall the incident?

A. I recall the incident that I was examined by the railroad doctor, Dr. Brown, I believe it was.

Q. About what time was that?

A. I can't give the date on that.

Q. Approximately?

A. About November, 1936, I think.

Q. That is the best of your recollection?

A. That is the best I recollect.

Q. And Dr. Brown was a medical officer or physician on that car?      A. Yes sir.

Q. What was his finding?

A. He passed me for live track duty.

Q. Now I should like to take you back, Mr.



(Testimony of W. L. Olive.)

Olive, to the time you first, after you were off during your sickness, that you returned and applied for employment. That was in December of 1935, wasn't it?      A. Yes sir.

Q. What happened then?

A. I was subject to what they call tossing duty, from one department to another, as I can see it.

Q. I am afraid that is conclusion. Now will you tell what happened and what was said by the railroad officials, when and [60] who said it, who you talked with and what was said by you?

A. I talked with Maydahl, Berry and Knickerbocker. These were all railroad officials.

Q. Who was Maydahl?

A. Car foreman.

Q. Who was present during the conversation?

A. I believe just the two of us.

Q. And when was it?

A. That was December 18, 1935.

Q. Go ahead and tell what happened.

A. I asked each of them to return to work and each in turn would refer me to the medical department. Then if I took it up with the medical department they would refer me back to the mechanical department and I didn't accomplish anything, so there isn't anything I can tell you about it.

Q. Who was Berry?

A. Berry was the master mechanic.

Q. Where is his place?

A. On the line, I think. He travelled up and down.

(Testimony of W. L. Olive.)

Q. And did you talk to him about the same time?

A. Yes sir.

Q. What did he say to you?

A. He referred me to the medical department.

Q. And did you talk to Mr. Knickerbocker?

A. Yes sir.

Q. When was that? [61]

A. That was shortly after I talked to Mr. Berry.

Q. Well, when did you talk to Mr. Berry? Give us a date, if you can, as nearly as you can.

A. I couldn't give you an exact date.

Q. Well, be approximate.

A. About January, 1936.

Q. Who was Mr. Knickerbocker?

A. He is superintendent of motor power and machinery.

Q. And what did he do?

A. He referred me to the medical department.

Q. And did you speak to any one else?

A. On quite a number of occasions.

Q. Who that was connected with the railroad company did you speak to?

A. The officials who were in charge. I saw each one of them as I could and on the dates that was convenient to them and those dates are confusing to me. I don't know the dates, but I contacted all the officials I could possibly contact and gained no results from them whatsoever.

Q. Did the company ever offer to return you to work?

A. No, but if I may make that a little more

(Testimony of W. L. Olive.)

clear—I was offered to be reinstated if I would waive all claim for back pay, which I figured was due me.

Q. When was that offer made?

A. That was made by Mr. Norton, who was superintendent of motor power and machinery. [62]

Q. Do you remember the date?

A. I don't know.

Q. To refresh your memory, you were also notified—by the way, who was Mr. Eney, Thomas J. Eney?

A. He was the general chairman to whom the case was given at a later date.

Q. Did Mr. Eney ever notify you to that effect?

A. Well, I think the case was given to the Brotherhood of Railway Carmen. When I found I couldn't do anything with it, I turned the case over to them and there was subsequent correspondence dealing with it and I believe the meeting that you spoke of while Mr. Eney did have charge of the case.

Q. Did you ever get a telegram from Mr. Eney relating to your returning to work?

The Court: He is a representative of the Carmen?

Mr. Taylor: He was the representative.

The Court: But he was plaintiff's representative?

Mr. Taylor: I am fearful he was.

The Court: On what theory could a telegram

(Testimony of W. L. Olive.)

from a representative of the organization be admissible?

Mr. Taylor: I was going to show it to counsel and he can consider it——

Q. Have you the telegram from Mr. Eney?

(Telegram produced and shown to opposing counsel.)

Mr. Taylor: Well, I will pass on that.

Q. Mr. Olive, I asked you if you were ever offered, the railroad [63] ever offered, to return you to work and you stated only on the basis that you waive any accrued compensation at that time. You indicated that some conversation was had with Mr. Norton. Who was Mr. Norton?

A. He was the general superintendent.

Q. About what date was that, if you recall?

A. I can't recall the date without referring to my file.

Q. Will you please fix the date if you can accurately and truthfully fix the date.

A. I am not a very good bookkeeper either. I have a letter here from Mr. T. J. Eney to Mr. Thurmond, or telegram, "Norton requests——

Mr. McNamee: We object on the ground it is hearsay.

The Court: You can use your file for the purpose of refreshing your memory, but telegrams from your own representatives would not be admissible. You can use your file for the purpose of refreshing your memory as to date.

A. That date was December 28, 1937.

(Testimony of W. L. Olive.)

Q. Did you talk to Norton on or about that time?

A. Yes sir, in the presence of the Local Joint Protective Board Committee of Railroad Carmen.

Q. And what did Norton say for and on behalf of the company, if anything, relating to your returning to work?

A. He said that he would reinstate me with the provision that I sign a waiver disclaiming any back pay due me. [64]

Q. But prior to that time you had been discharged, hadn't you?

A. I was discharged—I will have to look that up too.

Q. If you will.

A. I was discharged October 20, 1936.

Q. How was that discharge communicated?

A. The car foreman just gave me a slip of paper and said I was discharged.

Q. Have you that slip of paper?

A. I don't have the slip here, Mr. Taylor, but I have a photostatic copy of the original.

Q. May I see that copy? Do you know where the original is?

The Court: Gentlemen, it is 12 o'clock and I think at this time we will take our noon recess until 2:00 o'clock and I wish to admonish the jury at this time not to discuss this case among yourselves, allow any person to discuss it with you, express or form any opinion as to the merits of the case until it is finally submitted to you. This admonition is not a mere formality, but it is for the purpose of

(Testimony of W. L. Olive.)

having you keep your mind open until the case is finally submitted to you. With that admonition I will excuse the jury.

(Recess taken at 12:00 noon.) [65]

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Afternoon Session—March 19, 1945

2:00 p. m.

Presence of the jury stipulated.

Mr. Olive resumed the witness stand on further direct examination by Mr. Taylor.

(Last question and answer read.)

Q. That slip of paper referred to the memorandum regarding your discharge, is that true?

A. Yes sir.

Q. I call your attention to this paper here and ask you if that is the paper you have reference to?

A. Yes sir.

Q. This is the original notice that you received?

A. Yes sir.

Mr. Taylor: I offer this in evidence and ask that it be marked.

The Court: It may be marked next in order.

Mr. McNamee: No objection.

Clerk: Plaintiff's 4.

Mr. Taylor: (Reads) "Las Vegas, Nevada. 10-20-36

"Mr. W. L. Olive: This is to advise you that you have been disqualified from returning to work as carman.

"Maydahl."

Q. Now you stated, Mr. Olive, from the time of

(Testimony of W. L. Olive.)

your injury on until May, 1936, that you had a series of leaves of absence, is that true?

A. Yes sir.

Q. Have you those leaves of absence? [66]

A. I do.

The Court: Is there any question about that? I think counsel for the defendant also stated a number of leaves of absence.

Mr. McNamee: I would like to have them in evidence, if your Honor please. There is no question about it, but I would like to have it in evidence.

Mr. Taylor: We have leaves of absence dated February 25, 1934, to August 25, 1934, and one February 25, 1935, to August 25, 1935; one August 25, 1935, to February 25, 1936; one February 25, 1936, to May 25, 1936. We offer these as one exhibit, if the Court please.

Mr. McNamee: No objection.

The Court: Admitted next in order. What is the last date leave of absence expired?

Mr. Taylor: May 25, 1936.

Clerk: Plaintiff's 5.

PLAINTIFF'S EXHIBIT No. 5

Form 153

Union Pacific System

Request for Leave of Absence or Vacation

Las Vegas, Nev. June 11, 1934

Mr. J. F. Long, Los Angeles, Cal.

I request leave of absence of 6 months .....  
day from Feb. 25th 1934 to August 25th 1934.



(Testimony of W. L. Olive.)

Account: (State reason if request is for leave of absence) Personal injury.

My work is ..... in arrears. I entered the service 5-9-25.

Last Vacation ..... days to ..... 19.....

Last Leave ..... days to ..... 19.....

I understand that my Union Pacific group insurance will be cancelled if I am on leave of absence for more than 90 days for reasons other than sickness or injury, or if I fail to pay in advance to the Assistant Treasurer or an authorized agent any contribution to group insurance becoming due during my leave of absence. I further understand that if I deposit in advance the contributions to group insurance becoming due during my leave of absence but my services with the company are terminated during my leave of absence, my insurance will be cancelled at midnight of the last day of the month in which my services are terminated, without regard to the cause of such termination and any unearned contributions included in the deposit will be refunded to me; also, that acceptance of other employment during leave or failure to return to duty at expiration thereof may cause a break in my service record affecting my pension and pass privileges, and seniority rights, and my return to the service will be at the option of my employer.

My address during leave will be 1808 Sundry, Long Beach, Cal or 216 Carson str., Las Vegas, Ne.

(Testimony of W. L. Olive.)

Occupation: Ld Car Inspector; department or  
bureau: MP&C.

W. L. OLIVE

Signature

Condition of work, service and absence records  
correct. I recommend request be granted.

Recommended:

J. R. ORVGARD

Car Foreman

L. H. ANDERSON

For Gen'l Claim Agent

J. F. LONG

Supt. M. P. & Mach'y.

Approved:

O. JABELMANN,

Asst. Genl. Supt. Motive  
Power & Machinery [40]

Form 153

Union Pacific System

Request for Leave of Absence or Vacation

Las Vegas, Nevada. January 29, 1939

Mr. O. Jabelmann, Asst. GSMP&M.

I request Leave of Absence of 6 Month x Day,  
from February 25th, 1935 to August 25th, 1935.

Account (State reason if request is for leave of  
absence): Personal injury.

(Testimony of W. L. Olive.)

My work is not in arrears. I entered the service April 1925.

Last vacation ..... days to ..... 19.....

Last leave 6 mos., days to 2-25-34.

I understand that my Union Pacific group insurance will be cancelled if I am on leave of absence for more than 90 days for reasons other than sickness or injury, or if I fail to pay in advance to the Assistant Treasurer or an authorized agent any contribution to group insurance becoming due during my leave of absence. I further understand that if I deposit in advance the contributions to group insurance becoming due during my leave of absence but my services with the company are terminated during my leave of absence, my insurance will be cancelled at midnight of the last day of the month in which my services are terminated, without regard to the cause of such termination and any unearned contributions included in the deposit will be refunded to me; also, that acceptance of other employment during leave or failure to return to duty at expiration thereof may cause a break in my service record affecting my pension and pass privileges, and seniority rights, and my return to the service will be at the option of my employer.

(Illegible)

General claim agent

My address during leave will be 216 Carson Street, Las Vegas, Nevada.

(Testimony of W. L. Olive.)

Occupation: Lead Car Insp.

Department or Bureau: LV Car Dept.

W. L. OLIVE

Signature

Condition of Work, Service and Absence Records  
correct—I recommend request be granted.

Recommended:

J. R. ORVGARD

Car Foreman

J. F. LONG

SMP&M

Approved:

O. JABELMANN

Asst. GSMP&M [41]

Form 153

Union Pacific System

Request for Leave of Absence or Vacation

Las Vegas, 7-12-1935

Mr. O. Jablemann, AGSMP&M, Omaha, Nebr.

I request Leave of Absence of 6 Months, Aug. 25,  
1935, to Feb. 25, 1936.

Account: (State reason if request is for leave of  
absence) Parents Illness & Injury to Arm.

My work is Not in arrears. I entered the service  
5-9-25.

(Testimony of W. L. Olive.)

Last Vacation . . . . . Days to . . . . . 19..

Last Leave 6 Months, Days to Aug. 25, 1935.

I understand that my Union Pacific group insurance will be cancelled if I am on leave of absence for more than 90 days for reasons other than sickness or injury, or if I fail to pay in advance to the Assistant Treasurer or an authorized agent any contribution to group insurance becoming due during my leave of absence. I further understand that if I deposit in advance the contributions to group insurance becoming due during my leave of absence but my services with the company are terminated during my leave of absence, my insurance will be cancelled at midnight of the last day of the month in which my services are terminated, without regard to the cause of such termination and any unearned contributions included in the deposit will be refunded to me; also, that acceptance of other employment during leave or failure to return to duty at expiration thereof may cause a break in my service record affecting my pension and pass privileges, and seniority rights, and my return to the service will be at the option of my employer.

My address during leave will be Box 802, Las Vegas, Nev.

Occupation: Lead Insp. Department or Bureau: L. V. Car.

WILLARD L. OLIVE

Signature

(Testimony of W. L. Olive.)

Condition of Work, Service and Absence Records correct—I recommend request be granted.

Recommended:

W. MAYDAHL  
Car Foreman

J. F. LONG  
Supt MP&M

Approved:

A. L. LOONEY  
Supt. Car Dept. [42]

Form 153

Union Pacific System

Request for Leave of Absence or Vacation

Las Vegas, Nev., Feb. 24, 1936

A. L. Looney, Supt. Car Dept., Omaha, Nebr.

I request (Vacation) (Leave of Absence) Feb. 25th, 1936, to May 25th, 1936.

Account: (State reason if request is for leave of absence) Illness.

My work is Not in arrears. I entered the service April, 1925.

Last Vacation . . . . . Days to . . . . . 19..

Last Leave 180 Days to Feb. 25, 1936.

I understand that my Union Pacific group insurance will be cancelled if I am on leave of absence for more than 90 days for reasons other than sick-

(Testimony of W. L. Olive.)

ness or injury, or if I fail to pay in advance to the Assistant Treasurer or an authorized agent any contribution to group insurance becoming due during my leave of absence. I further understand that if I deposit in advance the contributions to group insurance becoming due during my leave of absence but my services with the company are terminated during my leave of absence, my insurance will be cancelled at midnight of the last day of the month in which my services are terminated, without regard to the cause of such termination and any unearned contributions included in the deposit will be refunded to me; also, that acceptance of other employment during leave or failure to return to duty at expiration thereof may cause a break in my service record affecting my pension and pass privileges, and seniority rights, and my return to the service will be at the option of my employer.

My address during leave will be 116 Carson Str., Las Vegas.

Occupation: Ld Car Inspr.

Department or Bureau: LV Car.

W. L. OLIVE

Signature

Condition of Work, Service and Absence Records correct—I recommend request be granted.

Recommended:

W. MAYDAHL

Car 4 Man



(Testimony of W. L. Olive.)

J. F. LONG

Supt. M.P. & Mach'y

Approved:

A. L. LOONEY

Supt. Car Dept. [43]

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Q. There is a period of time, Mr. Olive, August 25, 1934, to February 25, 1935, did you have a leave of absence during that period?

A. Those dates again?

Q. August 25, 1934, to February 25, 1935.

A. No.

Q. Didn't you have a leave of absence during that period?

Mr. McNamee: We will stipulate that he did.

Mr. Taylor: There is a missing link in there and I want to [67] show that one was lost, but it is stipulated by counsel there was one for that period.

Mr. McNamee: It is stipulated.

Q. Are you a member of the Brotherhood Railway Carmen of America? A. Yes, sir.

Q. How long have you been a member of that organization?

A. Since June 3, 1934, when the charter was admitted to this Local.

Q. And I direct your attention to Plaintiff's Exhibit 2, Rules, and ask you if you are familiar with those rules? A. Yes, sir.

Q. At that time can you say whether or not in

(Testimony of W. L. Olive.)

November 1, 1934, can you say whether or not the Brotherhood Railway Carmen of America was authorized to enter into agreements and bargain for you and the members of the organization with the railroad system?       A. Yes, sir.

Mr. McNamee: That is admitted in the pleadings, I think, that this bargaining agreement was entered into between the railroad companies and the Brotherhood.

Mr. Taylor: Yes, I guess you are right. I had overlooked that. That is right; thank you.

Q. Mr. Olive, are you acquainted with the provisions of the Railroad Retirement Act of 1935?

A. Yes, sir. [68]

Q. Were you at the time of your discharge so familiar with that Act, the provisions of it?

A. Yes, sir.

Q. Will you state whether or not the benefits of that Act are regarded as a valuable incident of the employment?

Mr. McNamee: Objected to as calling for conclusion of the witness.

Mr. Taylor: If your Honor please, I asked him if it was so regarded. The purpose of this is not to show damages resulting from his being cut off from his right to retirement, because we haven't pleaded that, and I don't know why we didn't plead that as damages, but we did not, but there is a question as to the duration of this contract, and in determining the duration of this contract, it is necessary to determine and decide all elements and questions

(Testimony of W. L. Olive.)

involved. If the Railroad Retirement Act had certain benefits that would ultimately accrue to a man for lengthy and loyal service to the railroad, it is my opinion proper to consider that, to the end that we might determine whether or not——

The Court: Counsel, you have stated that you did not plead.

Mr. Taylor: That is right.

The Court: Then don't you think it would be improper to bring that before a jury to cause them to consider something that is not before them?

Mr. Taylor: No, sir.

The Court: The Court so considers and instructs the jury [69] to disregard comments of counsel concerning matter pleaded because you have asked for damages solely on the basis of lost time as I understand.

Mr. Taylor: That is right, sir, and that is why——

The Court: I consider it highly improper and instruct the jury to disregard it.

Mr. Taylor: Very well, sir.

Q. Mr. Olive, at the time of your discharge what were you doing at that time?

A. I was lead car inspector.

Q. For the Union Pacific, Los Angeles & Salt Lake?

A. Yes, sir.

Q. What was the rate of pay that you were receiving?

A. I received five cents an hour over the inspector's rate, which was \$6.32 a day.

(Testimony of W. L. Olive.)

The Court: Then you were receiving \$6.37 a day? A. Yes, sir.

The Court: Eight hour day? A. Yes, sir.

The Court: How many days a week.

A. Five days a week at that time, sir.

Mr. Taylor: That isn't clear to me. You said you were receiving five cents more than car inspector?

The Court: He explained it, counsel, by saying the rate was \$6.32, so he was receiving \$6.37 [70] for 8 hours' work, is that correct?

A. I didn't figure it out. \$6.32 plus 5 cents an hour.

The Court: You mean 5 cents an hour, 40 cents a day?

Q. That would be \$6.72, is that correct?

A. That is right, sir.

Q. How many days a week did you say you worked? A. Five days a week.

Q. What is the normal period of work? Five days, is that normal or do the carmen work more days per week on occasions?

Mr. McNamee: Objected to. I think the criterion is what was the number of hours worked at the time of his alleged unlawful discharge.

The Court: What is normal, I don't know how anybody can answer that question. All he can do is to take the facts when he was working and when he might be working, what the records show.

Mr. Taylor: If your Honor please, am I permitted to show that subsequently the carmen worked longer hours during the period?

(Testimony of W. L. Olive.)

The Court: I think I will take judicial notice of that fact, that during the last few years a man has worked longer hours. I think that is a matter that we all recognize, during the war period a man has worked longer hours than usual. Counsel does not dispute that statement of the Court?

Mr. McNamee: No, I don't think so. [71]

The Court: You recognize that, too?

Mr. McNamee: That is right.

Mr. Taylor: I don't want to argue the case now, but in order that the jury might get to the import of this question, I would like to read from Rule 27 of the Rules, 37 and 38. I am now reading from Plaintiff's Exhibit 2, the rule or agreement:

“Rule 37. No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal.”

“Rule 38. No journeyman mechanic or regular helper who has been in the service of the railroad

(Testimony of W. L. Olive.)

ninety days shall be dismissed for incompetency, neither shall an employe be discharged for any cause without first being given an investigation.”

Q. Mr. Olive, I will ask you if prior to your discharge were you ever advised by the railroad, or any of its officers, of any charge pending against you? A. No, sir.

Q. Ever or at all? A. No, sir.

Q. Were you ever given an opportunity to present in your behalf witnesses? [72]

A. No, sir.

Q. Were you ever given an opportunity to appear before any investigating committee or board by counsel? A. No, sir.

Q. Have you received any compensation from the railroad for services or at all since this said dismissal? A. No, sir.

Q. Was any investigation, so far as you know, held relating to the subject of your discharge?

A. No, sir.

Q. After your discharge did you report the matter to the Local Committee of the Union?

A. Yes, sir.

Q. Do you know what disposition was made of that, if any?

A. Well, failing to obtain any satisfaction myself, I turned it over to the Joint Protective Board Committee to see what they could do.

Q. And when was that, if you recall?

A. With permission, I will have to look at the date.



(Testimony of W. L. Olive.)

Q. Will you refresh your memory if you can?

A. It was about November, 1936, I think.

Q. But after the discharge?

A. I am not certain. I think that is about right, November, '36.

Q. I will ask you if you know whether or not carmen, members of your crews, have had a raise of pay since your discharge? [73]

A. Oh, yes.

Q. Do you know what the present scale is?

A. I don't, sir.

Mr. Taylor: Do you know, Leo?

Mr. McNamee: No, I don't.

Mr. Taylor: May it be stipulated I will offer evidence on it a little later?

Mr. McNamee: Well, I might object, but I have no objection to its being offered out of order.

Mr. Taylor: You can take the witness.

### Cross-Examination

By Mr. McNamee:

Q. Calling your attention to Plaintiff's Exhibit No. 4, I will ask you to state whether or not that is the only notice that you received in regard to your so-called discharge?

A. Yes, sir.

Q. Now that states, it is addressed to you and it is signed by Mr. W. Maydahl?

A. Yes, sir.

Q. And it states: "This is to advise you that you have been disqualified from returning to work as carman," does it not?

A. Yes.

Q. Did any officer of the railroad company ever tell you that you were discharged?

A. Yes, that was my discharge.



(Testimony of W. L. Olive.)

Q. This is the only thing—doesn't this say that you were only disqualified from returning to work as a carman? [74]

The Court: It speaks for itself. Don't argue.

Q. You stated that you discussed this matter with Mr. Fred Knickerbocker, is that correct?

A. Yes, sir.

Q. And at that time Mr. Knickerbocker was the general manager of Los Angeles & Salt Lake Railroad Company, was he not? A. Yes, sir.

Q. And isn't it a fact that Mr. Knickerbocker told you that you could return to work as soon as you could pass the necessary medical examination, or words to that effect? A. If you—

The Court: Answer the question.

A. Well, I had several examinations that allowed me to go back to work.

Q. I know, but didn't Mr. Knickerbocker advise you that you could go back to work as soon as you could pass the necessary physical examination?

A. No, I don't think he did.

Q. What did he tell you?

A. He told me that I was discharged and that Mr. Maydahl had taken the necessary steps.

Q. Mr. Knickerbocker told you that you were discharged and Mr. Maydahl had taken the necessary steps? A. Yes.

Q. Are you sure of that? A. Yes, sir. [75]

Q. Did you ever talk the matter over with Mr. Burnett? A. I don't believe I have, sir.

Q. Did you ever talk it over with Mr. Norton?

(Testimony of W. L. Olive.)

A. Yes, sir.

Q. Did Mr. Norton ever tell you you could go back to work as soon as you could pass the physical examination?

A. No, but may I qualify that?

Q. Yes.

A. If I would release my contention for any back claim he would restore me to work, yes.

Q. That was his condition, if you would release your contention for any back pay, he would let you go back to work, is that correct?

A. Yes.

Q. About when was that?

A. I don't remember the exact dates, but I think I looked it up a while ago.

Q. Do you have any memorandum there that would help you fix the date?

A. Yes, sir. (Witness examines papers) December 28, 1937.

Q. When did you first submit your case to the Local Protective Board of the labor organization, the Brotherhood Railway Carmen of America?

A. Right after I was discharged.

Q. When was that?

A. In November, 1936. [76]

Q. And by discharge you mean when you were disqualified for service, at the time you received that notice?

A. When I was discharged, yes, sir.

Q. That was in October, 1936?

A. Yes, sir.

Q. And then it was in November that you submitted the matter to the local board?

(Testimony of W. L. Olive.)

A. Yes, sir.

Q. To whom did you submit it, which member of the local board?

A. The Joint Protective Board Committee, Mr. Thurmond, Mr. Urey and Mr. Jerry.

Q. Were you present at any conferences of that Board? A. Yes.

Q. Were any of the railroad officials present?

A. Not at the time I turned my case over to the Board, no.

Q. Do you know whether or not the Board took your case up with any of the railroad officials?

A. They did and they endeavored to handle it for me.

Q. And they did take it up with the railroad officials? A. Yes, sir.

Q. Which officials did they take it up with?

A. All of them, I presume.

The Court: You say you presume. You don't know who they took it up with, do you, except what somebody told you?

A. That is right. [77]

The Court: It is hearsay, counsel.

Q. Are you acquainted with Mr. Thomas J. Eney? A. Yes, sir.

Q. And during 1937 and 1938 Mr. Eney was the general chairman of the Local Protective Board of the Brotherhood Railway Carmen of America, was he not? A. Yes, sir.

Q. He was the general chairman for the Union Pacific System, is that right? A. Yes, sir.

(Testimony of W. L. Olive.)

Q. Did you ever submit your case to him and ask him to take the case up for you? A. Yes, sir.

Q. How many discussions did you have with Mr. Eney? A. Personally?

Q. Yes. A. One.

Q. Where was that?

A. In the Sal Saveg Hotel when I gave him the case.

Q. Did you ever hear from Mr. Eney after that?

A. On several occasions, all by correspondence.

Q. Do you have any of that correspondence with you? A. Yes, sir.

Q. May I see it?

A. If you wish, sir. The entire file of the case is there.

Q. May I have those? [78]

The Court: He has asked you to produce any correspondence you have with Mr. Eney at this time. It is up to counsel.

Mr. Taylor: We have no objection. In fact, I will stipulate now these are copies of which we have, that is the whole case, that went up to Eney. We will stipulate now that it goes into evidence.

Q. Were you ever present when any of the members of the Committee and officials of the railroad company discussed your case?

A. On one occasion.

Q. When was that?

A. At the time Mr. Norton——

Q. At that time that was in 1937, I believe you stated? A. The date is there, yes, sir.

(Testimony of W. L. Olive.)

Q. Yes, December, 1937, that was the time when Mr. Norton offered to let you go back to work, provided you waived your claim for back compensation, is that right?

A. With that provision, yes, sir.

Q. Were you present at any other conferences between the members of the organization and the railroad company officials? A. No.

Q. Now when were you first examined by Dr. Brown, do you remember?

A. I don't have the exact date, but Dr. Brown was with the examination car that travelled up and down the railroad and I went [79] to their examination car.

Q. Did Dr. Brown give you any slip showing that you were qualified for work?

A. That isn't customary with the medical department. He didn't give me any.

Q. Can you tell me what the date was that Dr. Slavin examined you and said that you were a border-line case on account of your blood pressure?

A. That was about November 20, 1935.

Q. That, however, was before you had applied to go back to work, was it not?

A. It is customary to take an examination before you return to work, yes, sir.

Q. I know, but at that time you were off on leave of absence, were you not? A. Yes, sir.

Q. And you had secured a leave of absence even after that, had you not? A. Yes, sir.

Q. So you weren't at that time applying to go

(Testimony of W. L. Olive.)

back to work, you were applying for a leave of absence, isn't that correct?

A. No, I applied to go to work. I submitted a bid on December 18, 1935.

Q. To go back to work? A. Yes, sir.

Q. But you also asked for a leave of absence on February 25, [80] 1936, did you not?

A. Yes, sir.

Q. You secured a leave of absence good until May, 1936, isn't that correct?

A. It is correct; to keep your leave of absence in order if you want to return to work.

Q. You stated on direct examination that you talked to several of the railroad company officials and they shoved you on to the medical department and then the medical department referred you back to the operating department. Now which one of the railroad officials besides Mr. Knickerbocker and Mr. Norton did you talk to in that regard?

A. My car foreman, Mr. Maydahl, and Mr. Morley and I believe the rest of it was all correspondence that is entered in that file. The file will bear out that statement.

Q. Now at the time of the last work for the company, your wages were 81½ cents per hour, were they not? A. That is right.

Q. That is your rate of pay? A. Yes.

Q. Eight hours per day? A. Yes.

Q. Fifty-six hours a week, that is correct?

A. Yes.



(Testimony of W. L. Olive.)

Q. Did you ever ask the railroad company to inform you why you were disqualified as a carman?

A. Yes, sir.

Q. And weren't you informed that it was on account of your physical condition?

A. No, they didn't answer that. That was all done by correspondence and it wasn't answered for two years and eight months why I was disqualified. I waited two years and eight months for that answer.

Q. Well, at the end of two years and eight months were you informed it was on account of your physical condition?

A. Yes, I was informed it was on account of my injured arm and I had already passed four examinations it was O. K.

Q. When were you informed it was on account of your injured arm?

A. It was a letter from Mr. Killian.

Q. Mr. Killian? A. Yes, sir.

Q. Was that from him to you? A. Yes, sir.

Q. Do you remember the date of that letter?

A. It is in that file, sir.

Q. In this file here? A. Yes, sir.

Q. Nobody had ever told you that you were being disqualified for any breach of rules or anything like that, had they? A. No, sir.

Mr. McNamee: I think that is all. [82]



(Testimony of W. L. Olive.)

Re-Direct Examination

By Mr. Taylor:

Q. Mr. Olive, what is your occupation?

A. I guess I am a railroad man.

Q. Have you any other occupation?

A. No, sir.

Q. None that you can call your vocation?

A. My vocation, no.

Q. What have you been doing since you were discharged by the railroad company?

A. Well, I have tried to transform my habits into a means of a livelihood. I have taught a little music, did a little odd jobs of painting, repair work of different kinds, most anything I could do to keep going.

Q. But you have had no regular employment that could be regarded as a vocation since you were discharged from the railroad?

A. With the exception of a year's work for the McNeil Construction Company.

Q. What were you doing then?

A. I was painting some of their axles out there.

Q. Mr. Olive—I submit this is a defensive matter, but I think inasmuch as they have opened up the question of pay, I should show what he has received that might be regarded as an offset against his principal claim. Mr. Olive, what have been your wage earnings since the date of your discharge?

A. Just a little better than \$900.00 a year.

Q. Approximately \$75.00 a month? [83]

A. Yes, sir.

Mr. Taylor: I think that is all.

(Testimony of W. L. Olive.)

Re-Cross Examination

By Mr. McNamee:

Q. I want to ask you one or two questions along the last line there. As a carman, what were your duties, Mr. Olive?

A. You mean the position I occupied?

Q. Yes.

A. I think I had 9 inspectors to keep busy and then I had to work for myself, of course, inspecting trains in-bound and out-bound.

Q. Well, did it consist of repairing cars that were in the yard? Was that a part of your duties?

A. I had to see that they were repaired.

Q. Did you have to have knowledge of carpentry in order to do that?

A. Slight knowledge, yes, sir.

Q. Did you also have to have knowledge of painting in order to perform some of those duties?

A. In a meager way, yes, sir.

Q. And you had to have knowledge of other mechanical trades, did you not?

A. Not enough to sustain you in any good trade outside of the railroad.

Q. In order to be a carman, didn't you have to be a carpenter?

A. Not in the carpenter's sense of the word, no, sir. You had [84] to know enough to repair the railroad cars, but carpentering and car-building is a lot different.

Q. When was it that you went to work for McNeil?

(Testimony of W. L. Olive.)

A. When the plant started. I don't know the date.

Q. That would be 1942? A. Yes, sir.

Q. And you worked for how long?

A. A year.

Q. And then were you ill after that for a while?

A. Yes, I had some of that gas out there and it upset me quite a bit.

Q. How long were you ill?

A. About two months.

Q. Then before that time did you work for Mr. Underhill? A. Yes, sir.

Q. Where was that?

A. It was in his recreation hall, 125 Fremont.

Q. How long did you work for Mr. Underhill?

A. About a year.

Q. What wages did you receive from him?

A. \$35.00 a week.

Q. And prior to that for whom did you work?

A. I believe that is all the steady work.

Q. Did you have unsteady work from time to time? A. Just odd jobs, sir.

Q. What was the nature of the odd jobs? [85]

A. Whatever I could get to do—a little repair work here, roof repair or painting a garage or something like that.

Q. Painting or rough carpenter work?

A. Rough work, yes, no carpenter work.

Q. After your injury, what was the first work that you did? A. I taught music.

(Testimony of W. L. Olive.)

Q. I mean the first rough work you did, the first heavy work?

A. I didn't do any for two or three years after I——

Q. Well, after you were disqualified to work for the railroad, when was the first heavy work you did after that?

A. When I went to work for McNeil.

Q. Did you apply for any work to anyone during the interim?      A. Yes.

Q. Who did you ask for work?

A. I tried to go to work as a carpenter out at Camp Seibert. I only lasted one day. That is when I found out I wasn't a carpenter.

Q. Did you apply for any other work as rough carpenter or carpenter helper?      A. Oh, yes.

Q. Did you get work as that?

A. No, I couldn't qualify for that kind of work.

Q. Couldn't you qualify as a carpenter's helper?

A. I could possibly carry lumber, yes, sir.

Q. What other positions did you apply for?

A. I believe that covered everything, sir. [86]

Q. Was that all you were qualified to work at?

A. Yes, sir.

Mr. McNamee: That is all.

The Court: You worked for Mr. Underhill for \$35.00 a week approximately a year?

A. Yes, sir.

The Court: What was your income from McNeil?

A. It was \$1.12 an hour.

(Testimony of W. L. Olive.)

The Court: How many hours did you work for McNeil?

A. Forty-eight hours a week, I think.

The Court: Time and a half after eight straight hours?

A. Yes, sir.

The Court: Do I understand during this war period you have not been able to obtain employment?

A. Not of the type of employment I have been used to doing, no, sir.

The Court: You have part of the time then not been doing anything? A. Yes, sir.

Mr. Taylor: The McNeil employment was during the war period? A. Yes.

The Court: Any further questions of this witness?

Mr. Taylor: I think that is all.

The Court: Next witness. [87]

Mr. Taylor: We have a stipulation from counsel that I desire to offer as Plaintiff's exhibit——

Clerk: That will be 6.

Mr. Taylor: ——relating to expectancy of life for a man 43 years of age.

The Court: You may read it then.

Mr. McNamee: I stipulated as to expectancy but I object to the admissibility on the ground it is irrelevant and immaterial.

The Court: I will hear from the gentleman on that.

Mr. Taylor: This is the theory, if your Honor

please, that this is a continuing contract. This is a contract for employment as long as a man may live or until he reaches the age of 60, under certain conditions, or 65, the age of retirement in this category of employment, and that having been discharged the measure of damages is those damages he suffered as a result of that discharge and that he should suffer as the result of being out of his employment throughout his——

The Court: Well, I think I will admit it. It is speculative at most as to the amount of wages this man is going to lose in the future, is purely speculative, because he might make more money than in his former job and it may be profitable to him, as far as that is concerned, and as far as expectancy is concerned, I think that is speculative.

Mr. McNamee: May it please the Court, I have one more objection [88] to the admission for the purpose of the record, and that is there is no contract introduced in evidence showing that plaintiff is engaged for the rest of his natural life.

Mr. Taylor: I think that is for the jury perhaps to determine, the effect of that contract.

The Court: Well, let us not argue. It will be admitted.

Mr. Taylor: Reading from Plaintiff's Exhibit 6:

“Stipulation.

“It Is Hereby Stipulated by and between the parties hereto and their respective counsel:

“That a human being forty-three years of age,



according to the American Table of Mortality, has an expectation of life of 26.00 years.

“Dated this 19th day of March, 1945.

“HAM & TAYLOR.

By RYLAND G. TAYLOR,  
Attorneys for Plaintiff.

LEO A. McNAMEE, ESQ., and  
FRANK McNAMEE, ESQ.,  
Attorneys for Defendants.

By LEO A. McNAMEE.”

The Court: We might as well take our afternoon recess. Members of the jury, we will take a recess for 10 minutes at this time and counsel will stipulate the admonition heretofore given without repeating.

Counsel: We do, sir.

The Court: Bear in mind the admonition heretofore given. [89]

(Recess taken at 3:00 P. M.)

3:10 P. M.

Presence of the jury stipulated.

The Court: You may proceed. Call your next witness.

Mr. Taylor: Your Honor please, I think counsel concurs in this stipulation, that from January, 1944, on forward to this time that the wage scale for a carman in the job that Olive had when he last worked was \$1.09 per hour. Do you concur in that?



Mr. McNamee: The wage scale for a carman was \$1.04 and for a lead man was \$1.09.

Mr. Taylor: And we agree that Olive, I believe, was a lead man.

Mr. McNamee: Well, I don't concur in that. That is his testimony.

The Court: That stipulation covers the situation, then it is for the jury to determine which classification he came under.

Mr. Taylor: We rest, if the Court please.

Mr. McNamee: At this time, if your Honor please, I would like to introduce the deposition of Dr. Landenberger.

Mr. Taylor: I want to interpose objections to that deposition, if your Honor please. If your Honor please, we object to the exhibits to the deposition, that is, reports of Dr. Slavin and Dr. Brown, upon the ground and for the reason that it isn't the best evidence. It is hearsay; that is Dr. Slavin's report [90] to Dr. Landenberger, and they have incorporated in——

The Court: Counsel, I can't pass on these objections until I know what the evidence shows. You can read the deposition and then you can interpose your objections to the exhibits and we will ask for them at that time. I do not know what the deposition contains, what the exhibits may be.

Mr. McNamee: I will start reading and counsel can make his objections as we go along:

(Reads.)

(Deposition of Dr. J. C. Landenberger.)

“Deposition of Dr. J. C. Landenberger, a witness on behalf of Defendants, in the above-entitled Court, taken pursuant to the annexed Stipulation, at the residence of Dr. J. C. Landenberger at 58 Virginia Street, Salt Lake City, Utah, on the 8th day of March, 1945, beginning at 5 o'clock P. M., the witness being first duly sworn by me, the undersigned, a Notary Public in and for the State of Utah, who made answer under oath, to the respective interrogatories and cross-interrogatories attached to said Stipulation to him by me, as follows:

1st Interrogatory: What is your name?

A. John Carroll Landenberger.

2. What is your residence?

A. 58 Virginia Street, Salt Lake City, Utah. [91]

3. How old are you, Doctor?

A. 70, July 12th, this year.

4. What is your business or occupation?

A. Physician and surgeon.

5. How long were you engaged in the profession of physician and surgeon?

A. Forty-five years.

6. What medical school did you graduate from, and when did you graduate? What degrees have you received?

A. University of Pennsylvania, 1900. Doctor of Medicine.

7. When and where did you serve your internship?

A. St. Marks Hospital, Salt Lake City, Utah, 1900 to 1902.

(Deposition of Dr. J. C. Landenberger.)

8. In what states have you been licensed to practice medicine, and when were you licensed in each?

A. The State of Utah.

9. Do you belong to any medical or surgical societies and if so, please name them?

A. Salt Lake County Medical Society, Utah State Medical Association, American Medical Association, Pacific Association of Railway Surgeons, Fellow American College of Surgeons, Fellow American Association for the Surgery of Trauma.

10. During the years from 1935 to 1938, inclusive, [92] what official position, if any, did you hold with Union Pacific Railroad Company?

A. Chief Surgeon, also District Surgeon.

11. If your answer to the foregoing interrogatory be that you were Chief Surgeon, please state what your duties as such consisted of?

A. Management of the entire Hospital Department.

12. Over what territory did your jurisdiction as Chief Surgeon extend?

A. The Central and South Central Districts.

13. Did said Railroad Company also have employed, so-called "local Doctors" or "local Surgeons" in various localities along its lines?

A. Yes. These men were a part of our Hospital Department.

14. State whether or not it was a part of your duties to examine the physical condition of the employees of said Railroad Company, with a view of determining whether such employees were physically

(Deposition of Dr. J. C. Landenberger.)

able to perform their respective duties with safety to themselves and to others.

A. It was a part of my duty to approve the qualifications or rejection of all employees under my jurisdiction, after they had been examined by the local Doctors, and in some instances I made the examination myself. [93]

15. State whether or not it was a part of your duties as such Chief Surgeon to check the examinations, reports and recommendations of the local Railroad Doctors in connection with the physical condition of Railroad employees. A. Yes.

16. Are you acquainted with the Plaintiff in this case, Mr. W. L. Olive? A. Yes.

17. Did you ever have occasion to examine Mr. Olive physically, and if so, state on how many occasions, when, and the approximate date or dates of your said examinations.

A. Yes. I examined Mr. Olive in January, July and October of 1935, and probably on other occasions of which I have no definite recollection.

18. What was the purpose of said examinations?

A. The purpose of said examinations was to determine on behalf of the Railroad Company whether Mr. Olive was physically able, notwithstanding his recent injury, to perform his duties as Car Inspector or Car Repairer, with safety to himself and others.

19. Please state what said examinations consisted of and what tests, if any, were made.

A. General physical examination with patient [94] stripped, including observation of heart, lungs,

(Deposition of Dr. J. C. Landenberger.)

liver, abdomen, nervous system, extremities, bones and joints, etc., including urinalysis, blood pressure observation, etc.

20. What were your findings or determination as to his physical condition, from the examinations made by you, at the time of said respective examinations?

A. General condition was more or less normal. The blood pressure was up some, and there was limitation of motion at the left elbow. Flexion of the arm at the elbow was limited to 90 degrees, and extension was incomplete.

21. Did you ever have occasion to examine the reports of the physical condition of Mr. Olive, made by any of the local Railroad Doctors, who were under your jurisdiction?      A. Yes.

22. If so, by whom were such reports made?

A. Dr. Slavin and Dr. Kenneth C. Brown.

23. What are the approximate dates of such reports?

A. Respectively, May 21, 1936; July 25, 1936, and August 4, 1936.

24. If you have any of said reports, will you please hand the same to the Notary who is taking [95] this deposition, so that he may identify them with appropriate Exhibit numbers, and so that they may be attached to and become a part of your deposition.      A. Yes.

(The said reports are identified as Exhibits Nos. 1, 2, and 3, and the same are forwarded herewith.)

(Deposition of Dr. J. C. Landenberger.)

25. State whether or not you, as Chief Surgeon, rejected the Plaintiff, W. L. Olive, for re-employment by Union Pacific Railroad Company, as a Car Inspector?      A. Yes.

26. If your answer to Interrogatory No. 25 is in the affirmative, did you make any report of such rejection to any of the officers and agents of said Railroad Company; if so, when, and to whom? \* \* \*

Mr. Taylor: We have to state the answer before we can make the point of the objection.

“A. To Mr. F. H. Knickerbocker, July 30, 1936, and to Dr. Nilsson, May 27, 1938.”

Mr. Taylor: That is premised upon the examination of Dr. Landenberger, if at all, his examination of January, July, and October, 1935. His report is as of July 30, 1936, and May, 1938, which in itself is too remote. An examination of the dates indicated it could not be the basis of a finding, the examination of January, July, and October, 1935, could not be the basis of a [96] report made in July, 1936, and May of 1938. It is too remote because at that time the man and his physical condition was improving all the time.

The Court: Well, counsel, the defense in this case, in part at least, not entirely, is claiming that this man during certain periods was physically unable to perform his duties. Now is there any evidence that tends to prove or disprove that admissible? For instance, in this case—I don't know what the nature of his injury was—but they mention an elbow. Now as the improvement progresses, isn't



(Deposition of Dr. J. C. Landenberger.)

that admissible to show the nature of his injury and of this progressive condition for a certain time, and the jury are entitled to have that information.

Mr. Taylor: But the point—I may not be clear—he reports to Mr. Knickerbocker that the man is physically unfit——

Mr. McNamee: I have not got down to that. I think your objection, together with your reasons for the objection, is a little premature, until we get down to the meat of it.

Mr. Taylor: No, in July of 1936——

Mr. McNamee: You did not even let me read the answer. I had to read the answer in order to make the objection. The question was: “If your answer to Interrogatory No. 25 is in the affirmative, did you make any report of such rejection to any of the officers and agents of said Railroad Company; if so, [97] when and to whom?”

A. To Mr. F. H. Knickerbocker, July 30, 1936, and to Dr. Nilsson, May 27, 1938.”

Mr. Taylor: Yes, that is just the point. Upon examination made in January, July, and October of 1935 he makes his findings in July, 1936, and May of '38 based upon a——

The Court: Well, I understand, counsel, by your opening statement for some period of 1937 he was physically able to resume his duties.

Mr. Taylor: Yes, that is true, sir.

The Court: And I assume that there is a dispute between you as to when he was able to resume his duties?



(Deposition of Dr. J. C. Landenberger.)

Mr. Taylor: That is right, sir.

The Court: And any evidence that tends to prove or disprove that evidence is admissible. Objection is overruled.

Mr. McNamee: Well, that answer to that question is: "To Mr. F. H. Knickerbocker, July 30, 1936, and to Dr. Nilsson, May 27, 1938. (Continues with deposition):

"27. Did you give any reasons for your actions in this regard, and if so to whom were they given?

A. Yes. To Mr. F. H. Knickerbocker and Dr. Nilsson.

28. If your answer to Interrogatories 26 and 27 are in the affirmative, what were your reasons for so rejecting him?

A. On account of limitation of motion of left arm [98] at elbow I considered that Mr. Olive could not carry on his occupation as Car Inspector or Car Repairer with safety to himself and others.

/s/ J. C. LANDENBERGER."

Now at this time I offer in evidence as Defendant's Exhibits 1, 2, and 3, respectively, physical test records, two of which are signed by Dr. Hale B. Slavin, one dated May 25, 1936, one dated July 25, 1936, and one dated August 4, 1936, signed Kenneth C. Brown, two of which were signed by rubber stamp by Dr. Landenberger.

Mr. Taylor: To which we object, if your Honor please, on the grounds and for the reason they are

not the best evidence, they are hearsay, so far as Dr. Landenberger is concerned, and the further objection that they are not the best evidence. It is a written report.

The Court: Where are the doctors who signed the reports?

Mr. McNamee: Well, Dr. Slavin is in the South Seas, if your Honor please. I don't know where Dr. Brown is.

Mr. Taylor: Where is Dr. Brown?

Mr. McNamee: I don't know.

The Court: Counsel, it seems to me that the present objection is good because there is not sufficient foundation. I might state if you have evidence to show that these are part of the records of the railroad company, kept in the records in the ordinary course of business, that I might take [99] a different position in the matter, but there is nothing here——

Mr. McNamee: Well, Interrogatory 24 was: "If you have any of said reports, will you please hand the same to the Notary who is taking this deposition, so that he may identify them with appropriate Exhibit numbers, and so that they may be attached to and become a part of your deposition," and the answer is: "Yes," and it says: "The said reports are identified as Exhibits Nos. 1, 2 and 3, and the same are forwarded herewith." That appears from the deposition the reports were submitted——

The Court: I believe the objection at this time is good. It may be altered later, if you can introduce evidence to show that those are reports prepared by the railroad company in the ordinary

course of business and parts of their records, it will be admissible. It may be marked for identification at this time.

Clerk: A, B, C for identification. [100]

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MR. F. H. KNICKERBOCKER,

a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. McNamee:

Q. Please state your name.

A. F. H. Knickerbocker.

Q. Where do you reside, Mr. Knickerbocker?

A. Salt Lake City.

Q. What is your profession, business, or occupation?

A. I am Executive Assistant to the President of the Union Pacific Railway.

Q. Between 1933 and 1937 what was your business or occupation?

A. I was General Manager of the L. A. & S. L. Railroad at Los Angeles.

Q. That is the Los Angeles & Salt Lake Railroad at Los Angeles?      A. Yes.

Q. And how long were you such general manager?

A. About 13 years.

Q. From when to when?

A. From May 1, 1924, until April 15, 1937.

(Testimony of F. H. Knickerbocker.)

Q. Are you acquainted with Mr. W. L. Olive, the plaintiff in this case?      A. I am.

Q. How long have you known him?

A. I knew Mr. Olive when he was working at Pocatello, Idaho. I was general superintendent there around '16 or '17.

Q. Did you ever talk to him at Las Vegas? [101]

A. On one occasion.

Q. Just a minute. Do you remember when Mr. Olive was injured while working for the railroad company?      A. Yes, on February, 1934.

Q. And did you ever have any conversation with Mr. Olive subsequent to that injury?

A. Yes.

Q. When was it?

A. Well, I think it was in February, 1936.

Q. Is that the only conversation you had with him in Las Vegas that you know of?

A. That is the only one.

Q. Just state what the nature of that conversation was.

A. At that time Mr. Olive's physical condition was such that he was unable to pass the required examination of our company doctors. He spoke to me about the possibility of returning to work. I stated to him at that time that whenever the company doctors said that he was in safe condition to return to work that he would be permitted to resume service.

Q. Did you hear Mr. Olive's statement here on the stand, to the effect that you told him that he

(Testimony of F. H. Knickerbocker.)

was discharged and Maydahl had notified him that he was discharged? Did you hear him make that statement?

A. I heard him make that statement.

Q. Was there any such conversation between you and him? A. There was not. [102]

Q. Did you ever talk to him after his so-called discharge in October, 1936? A. No.

Q. This conversation that you had with him you said was in February, 1936?

A. That is my recollection, in February, 1936, and the only conversation I had with Mr. Olive about his case.

Q. Did he tell you at the time he was discharged?

A. I do not think the word "discharged" was used at any time in Mr. Olive's case. He was merely disqualified because of an injury that he sustained in February of 1934, which prevented him from passing the physical examination of the company doctors.

Q. Now in regard to carmen, Mr. Knickerbocker, what is the general nature of their duties as carmen?

A. Car inspectors are required to inspect both freight and passenger trains, to see that the running gear is in proper and safe condition to run, that the steam is through the passenger trains, that the proper servicings of water and ice and such things are completed, and when that work is done, to see that all airbrake equipment is in operative condition throughout the train. That is the last

(Testimony of F. H. Knickerbocker.)

thing that is done. Somewhat similar duties are required in the inspection of freight trains, except, of course, there is no steam or watering servicing to be done. When they are not inspecting trains that are passing through terminals, they have other work; they give car repair out on the rip track on any trains there, and such work consists at [103] times of repairing the superstructure of box cars, refrigerator cars, as well as the decks of flat cars, and so on.

Q. Must they have a knowledge of carpentering in order to be able to qualify as car repairer?

A. They must.

Q. Up until April, 1937, have you been advised by any of the company doctors that Mr. Olive had been passed physically?

A. I have no recollection of Mr. Olive's case subsequent about, I think, October or possibly November, 1936, and at that time I was advised that he was then in condition to resume service but had declined to do so, pending an adjustment in his time claim.

Q. In order to be qualified as a carman, I will ask you to state whether or not it is necessary for a man to have the use of his extremities, like his arms and his legs?

A. They are very essential to the proper handling of the job. They are required at times to crawl under cars, climb up cars, either on the ladder on the ends of the box cars, refrigerator cars, or down a ladder that may be placed beside them, and any



(Testimony of F. H. Knickerbocker.)

impairment of any defect in a man's arms or legs would certainly make him a risk and a hazard, not only to himself, but possibly to fellow employees.

Q. Now I will show you a book which is entitled, "Union Pacific System," with the names of several of the companies belonging to that system, "Rules Governing the Determination of Physical Qualifications of Employees. Operating Department. Effective [104] January 1, 1927," and ask you if you are acquainted with that book?

A. I am.

Q. Can you state when that was promulgated or put out?

A. It became effective on January 1, 1927.

Q. And what does it purport to contain?

A. It contains the rules that are embodied in here pertaining to the physical condition of employees. I notice that my name as general manager for the Los Angeles & Salt Lake Railroad Company is signed to the rules, along with other operating officers.

Q. In regard to Rule 4 that is appended thereto, was that in effect at the same time, or do you know when that was changed?

A. I think it was changed subsequently to the effective date of January 1, 1927, but just what date Rule 4 was changed or modified, I am not clear now, without looking at the record.

Q. I show you this, and I am going to offer it in evidence. I will ask you to state whether or not this book of rules, pertaining to the medical condi-

(Testimony of F. H. Knickerbocker.)

tion of employees, is one of the conditions of the employment of each of the employees of the operating department at that time?      A. It is.

Mr. McNamee: May this be marked as defendants' exhibit.

The Court: I understand there is no objection?

Mr. Taylor: No objection. [105]

Clerk: Defendants' Exhibit "D".

Mr. Taylor: What was the effective date of that amendment?

Mr. McNamee: He didn't know the effective date of it.

The Court: He testified he didn't know.

Q. I will show you defendants' Exhibits A, B, and C for identification and ask you to state whether or not you know what those instruments are?

A. These are physical test records issued in all cases by the examining surgeon of the railroad.

Mr. Taylor: I object.

The Court: He is not testifying as to the contents.

Mr. Taylor: I am fearful the harm will be done by this method.

The Court: I will clarify the atmosphere. Mr. Witness, are these records kept in the regular ordinary course of business of your company?

A. Yes sir.

Q. And are part of the files of your company?

A. They are.

Q. Kept in due course and regular course of business?      A. Yes sir.

(Testimony of F. H. Knickerbocker.)

Q. And are furnished to you by various surgeons or physicians that made the examinations?

A. Yes sir.

The Court: They will be admitted in evidence, gentlemen. [106] If you will look in the Judicial Code, I think 572 or 578, you will find records kept in regular and ordinary course of business are admissible.

(Exhibits A, B, and C admitted in evidence.)

### DEFENDANT'S EXHIBIT "C"

As set forth in "Designation of Record" Filed March 19, 1945.

Union Pacific Railroad Company

Physical Test Record

(To be made by medical examiner)

#### Biennial Re-Examination

Of Olive, Willard Lynn, age 33, Residence Las Vegas, candidate for Return to Service as Car Inspector on U. P. R. R. Railroad, S. W. Dist., Division 18.

Height 6', Weight 189, color of eyes blue, color of hair brown.

What diseases or illness have you ever had? Usual childhood & pneumonia, Appendectomy 1927.

Have you been disabled from sickness in past 5 years? No.

(Testimony of F. H. Knickerbocker.)

Nature of sickness: Duration.

What injuries have you ever had? Fracture of left humerus 1933.

Do you have cough? No.

Shortness of breath? No.

Palpitation? No.

Dizziness? No.

Headache? No.

Weakness? No.

Difficult or frequent urination? No.

.....

(Signature of employee)

4th Test—General Physical Examination

Nervous.

Urine: Spec. Grav. Albumin Neg. Sugar Neg. Microscopical, if ordered.

Rate of Pulse 112 B.P.S. 146.

When? NT 98

Has he had Smallpox? No, or been vaccinated? Yes when NT.

Has applicant ever been or is he now the subject of disease of lungs? No. Heart? No. Stomach? No. Bowels, including rectum? No. Kidneys? No. Genito-urinary organs? No. Nervous system? No. Skin. No.

(Testimony of F. H. Knickerbocker.)

Has applicant any deformity or disability due to injury or disease? If so describe .....

Has he hernia? No. What form? Present condition of same?

Has he hydrocele? No. Size? Varicocele? No. Size?

Distinguishing marks or characteristics.

Order for examination issued by: Title.

Is candidate Qualified or Disqualified? (When in doubt, refer to Chief Surgeon).

Dated at Las Vegas, August 4th, 1936.

/s/ KENNETH C. BROWN M. D.

Signature of Surgeon.

Remarks: Tonsils, Neg. Teeth, fairly good. Thyroid, Neg. Rhomberg, Neg. Reflexes, Neg.

Endorsement of Chief Surgeon, Rejected.

Forward in duplicate to Chief Surgeon. (Stamp not decipherable).

[Endorsed]: Filed March 2, 1945. [37]

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Mr. McNamee: Cross-examine.

Mr. Taylor: No cross-examination.

Mr. McNamee: That is all.

Mr. Taylor: I do want to cross-examine, if your Honor please. I will ask your Honor's leave—well, your Honor made the ruling—I still question

(Testimony of F. H. Knickerbocker.)

those documents, but I don't want to be in the position of defense here.

The Court: You are doing a pretty good job. You might as well proceed.

Mr. Taylor: Well, I have no further questions.

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MR. JOHN W. BURNETT,

a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. McNamee:

Q. Please state your name?

A. John W. Burnett.

A. Chicago, at the present time.

Q. What is your profession, business or occupation?

A. I am selling for the Runyan Metals Company.

Q. Were you ever employed by the Union Pacific Railroad Company?      A. Yes sir.

Q. And the Los Angeles and Salt Lake Railroad Company, or just the Union Pacific?

A. Well, the Union Pacific employment called for jurisdiction over the Los Angeles and Salt Lake mechanical department.

Q. When did you leave the employ of the Union Pacific?      A. June 1, 1940.

Q. What was your position with the Union Pa-



(Testimony of John W. Burnett.)

cific when you were employed by them, up to the time that you left the service?

A. General superintendent of motive power.

Q. And how long had you held that office?

A. Since 1933, August, 1933.

Q. Are you acquainted with Mr. W. L. Olive, the plaintiff in this case? A. No sir. [108]

Q. Did you ever meet him?

A. I do not know as I ever met him. I may have seen him around the works.

Q. You never had any discussions with him yourself? A. No sir.

Q. Did you ever have any discussions with Mr. T. J. Eney as his representative? A. Yes sir.

Q. And were those discussions relative to Mr. Olive being returned to the service of the Union Pacific Railroad? A. Yes sir.

Q. Do you remember when you had your first conversation or discussion with Mr. Eney?

A. It was the practice to hold meetings once each month with all the general chairmen of the different crafts and in two or three of those meetings—I don't recall the dates except the last one in Salt Lake—Mr. Olive's case was discussed before all the general chairmen representing all the crafts of the railroad.

Q. Did you know at that time that Mr. Olive had previously been injured while in the employ of the railroad company? A. Yes sir.

Q. And you knew that he had been out of service on account of his injury for some time?

(Testimony of John W. Burnett.)

A. Yes sir.

Q. What was the nature of the discussion? What did you and [109] Mr. Eney discuss at this conference?

A. Well, Mr. Eney, representing Mr. Olive, asked to have Mr. Olive go back to work and during the discussion it developed from the files that Mr. Olive had never been approved by the medical department as in fit condition to go to work and I believe that at the last meeting in Salt Lake City, which was probably in May of 1936, Mr. Eney called Mr. Olive by telephone.

Q. Was that May of 1936 or later?

A. It may have been later. That date is not clear in my mind, but anyway, he called Mr. Olive by telephone during the meeting and advised Mr. Olive——

Mr. Taylor: We object as hearsay.

The Court: You didn't hear?

A. I heard his end of the conversation and I was sitting in the room with him and he said—if Mr. Olive was on the other end of the phone and I assume he was—that is an assumption—that he would have to be examined and get an approval or OK from the chief surgeon before he could go to work, and that was my request to Mr. Eney at the time.

Q. Subsequent to that, did you have any conversation with Mr. Eney?

A. I had different conversations with Mr. Eney at different times.

(Testimony of John W. Burnett.)

Q. In regard to this Olive case?

A. In regard to the Olive case, yes sir.

Q. Did you ever have any correspondence with Mr. Eney concerning [110] this case?

A. Yes sir.

Q. I will show you what purports to be a letter from Mr. Eney and ask you whether or not you are acquainted with that signature?

A. I am sir.

Q. And is that the signature of Thomas J. Eney?

A. Yes sir.

Q. And did you receive this letter in due course of mail?

A. I did.

Mr. McNamee: I wish to offer this letter in evidence.

The Court: Can't we move along a little faster?

Mr. McNamee: I offered this letter in evidence and I was waiting for counsel.

Mr. Taylor: I had not seen the letter. To which we object, if your Honor please, because there is no evidence that the letter came to the attention of Mr. Olive.

The Court: If he is his representative, it wouldn't make any difference, would it?

Mr. Taylor: I think it would, if your Honor please.

The Court: You have been relying upon statements of the representatives of the railroad company.

Mr. Taylor: The Union is authorized to represent the Union in terms they make with the railroad in regard to the contract and working condi-

(Testimony of John W. Burnett.)

tions and such as that, but the Union wouldn't have any—the Union couldn't go as far as to [111] sell a man down the river. He couldn't waive his inherent rights to enforce the contract without his knowledge of what was going on.

The Court: I know, but Mr. Olive testified that this man Eney, he consulted with him and asked him to represent him, to take up with the railroad company his reinstatement. It was his own testimony that established him as his representative, as his agent, whether he was connected with the Brotherhood or not. Isn't that Mr. Olive's testimony?

Mr. Taylor: Yes, it is true he testified——

The Court: It will be admitted. In admitting evidence, gentlemen, I believe in putting the whole picture before the jury.

Clerk: Defendants' E.

Q. (Mr. McNamee) I show you what purports to be another letter signed by Mr. Eney, dated October 21st, but apparently a typographical error, should be October 31st instead of 21st, signed Thomas J. Eney, and ask you to state whether or not that is the signature of Thomas J. Eney?

A. It is.

Q. And did you receive this letter in the due course of mail?           A. I did.

The Court: Gentlemen, read that letter. That is the only way the jury will know what we are talking [112] about.

Mr. Ham: If the Court please, we object to the

(Testimony of John W. Burnett.)

introduction of the letter. Counsel is presuming to change the date and there are pencil marks on it designating the change.

Mr. McNamee: Well, I will cross it out.

The Court: That is true. Read the other letter, counsel, which is in evidence so we will keep moving here.

Mr. McNamee: I will read to you letter dated July 26, 1938, which is Defendants' Exhibit E:

"J. W. Burnett  
Gen. Supt. MP&M  
Omaha, Nebraska

Dear Sir:

"In reply to your letter of July 12, with reference to the case of W. L. Olive, Carman at Las Vegas, Nevada.

"Wish to state that the Executive Board of the B.R.C. of A. on the Union Pacific System in Ogden, Utah, on June 5, 1938, requested me to negotiate return to service W. L. Olive pending settlement of his claim for compensation from May 1935 up until the time he was returned to service.

"As per your previous letter which you stated that you would have Olive re-examined and if physically fit he would resume his service as Car Inspector at Las Vegas. Wish to inform you that Mr. Olive refuses to accept this settlement; therefore in accordance with the wishes of the Executive Board, I placed the complete file in the hands of

(Testimony of John W. Burnett.)

the General President of the B.R.C. of A., Felix H. Knight, Kansas City, for final disposition. I will advise you that you may receive copy of the reply when I hear from him concerning this case.

“Very truly yours,

“THOS. J. ENEY

“General Chairman J.P.B.”

Mr. McNamee: We offer this.

Mr. Taylor: What is the date of that last letter?

Mr. McNamee: It is October 21st.

Mr. Taylor: What year?

Mr. McNamee: 1938. This is letter dated October 21, 1938: (Reads)

“Mr. J. W. Burnett,  
Gen. Supt. MP&M,  
Omaha, Nebraska.

Dear Sir:

“This is in reply to your letter of October 22, File No. 011-122-2, received at this office October 27, in which you refer to conference in connection with the case of W. L. Olive, Carman at Las Vegas, Nevada.

“You state that you are agreeable to returning Mr. Olive to service and that you will not assume any responsibility for Mr. Olive’s failure to return to service since October 1937.

“If, as Mr. Olive requests, you will return him



(Testimony of John W. Burnett.)

to service with compensation from May 1935 up until the present time, he is agreeable to return to service. As you have refused this, he has been so notified and it is within his jurisdiction to determine his own responsibility.

“As stated before in conference, I have turned the file over to the General President, F. H. Knight, upon request of the Executive Board of the Joint Protective Board of the Carmen.

“Very truly yours,  
(Signed) THOS. J. ENEY  
General Chairman J.P.B.”

Q. Prior to that time, Mr. Burnett, you did make an offer to Mr. Eney to return Mr. Olive to work providing he would waive his back time, did you not?

A. Prior to that time I told Mr. Eney that he could go to work [114] if and when he was approved by the medical department and Mr. Eney advised me that he wanted back pay and in those cases we can't settle any back pay arguments at the time we authorize a man to go to work. That is for later consideration and we couldn't even talk to Mr. Eney about back pay to Mr. Olive until he went back to work and appealed his back pay with the organization set up to handle such matters.

Q. Have you ever sat in on any of those conferences in regard to back pay or disputes between the employee and the railroad company?

(Testimony of John W. Burnett.)

A. I have——

Mr. Taylor: We object.

The Court: Just a minute. Read the question.

(Question read.)

The Court: Objection will be sustained. We are trying this case, gentlemen.

Mr. McNamee: Cross-examine.

Cross-Examination

By Mr. Taylor:

Q. Did you know your company said to Mr. Eney that Mr. Olive would be reinstated to his employment on the basis of no compensation for time lost? Did you ever tell him that?

A. Repeat that. You stated——

The Court: Read the question.

(Question read.)

A. I don't recall that I did, but it is entirely possible, because [115] occasionally we offered a man that was seeking reinstatement that particular consideration.

The Court: Did you ever offer Mr. Olive an opportunity to go back to work and handle the question of compensation due through other channels?

A. Yes sir.

The Court: When?

A. To Mr. Eney in Salt Lake City, that meeting we held in May 19—I will have to depend upon the record of the meeting for that date. I do not remember exactly.

(Testimony of John W. Burnett.)

Q. (Mr. Taylor) Was that about May 30th of 1938?

A. That is probably true, right in there some place.

Q. (Mr. McNamee) Is that in regard to the conference?

A. Conference, yes, in Salt Lake City.

The Court: Did you ever get any reply to that offer?

A. Yes, I got a reply from Mr. Eney to that offer.

The Court: What was his reply?

A. The reply was he had submitted that offer to Mr. Olive and Mr. Olive refused to go to work without compensation for time lost before he went to work.

Mr. Taylor: That is all.

Mr. McNamee: That is all, Mr. Burnett. [116]

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MR. THOMAS E. ENEY,

a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. McNamee:

Q. Will you please state your name?

A. Thomas J. Eney.

Q. Where do you reside, Mr. Eney?

A. I reside at Edmonds, Washington.

(Testimony of Thomas E. Eney.)

Q. What is your business or occupation?

A. At the present time I am retired on disability.

Q. During the years 1934 to 1938, inclusive, what was your business or occupation?

A. General Chairman of the Brotherhood of Railway Carmen of America, Joint Protective Board, for the Union Pacific System.

Q. And where did you have jurisdiction, over the Union Pacific System?

The Court: He stated Union Pacific.

Mr. McNamee: I couldn't hear. I see.

Q. Are you acquainted with Mr. Olive?

A. I am.

Q. How long have you known Mr. Olive?

A. Well, I presume—well, I would say since 1935.

Q. On how many occasions have you met Mr. Olive, do you remember?

A. Well, I would say on or about two occasions.

Q. When was the first occasion that you met him, do you remember? [117]

A. Well, if I can recollect right, I think it was 1935. I am not sure, though, it has been so long, I couldn't say, but I was out here on a visit with him and I think there was one of the committee along and we went down to see the doctor.

Q. Was that after his injury on the railroad?

A. That was after his injury.

Q. And did he ask you at that time to see about his being returned to work?

A. He was mostly concerned in being returned to service.

(Testimony of Thomas E. Eney.)

Q. Do you know whether or not he had taken the matter up with the Local Protective Board at that time?

A. I would not be in a position to say unless I had my file. I do not think so.

Q. You do not have your file with you?

A. No, sir.

Q. Where is your file, Mr. Eney?

A. My successor has the file in Omaha, Nebraska.

Q. At any time did you represent Mr. Eney in his application to the railroad company for reinstatement?

A. You said Mr. Eney.

Q. I mean Mr. Olive.

A. May I have that question?

Q. I say did you represent Mr. Olive in his application for reinstatement with the railroad company?

A. I did.

Q. With whom did you discuss his case? [118]

A. You mean with the railroad company?

Q. Yes.

A. I discussed it with Mr. J. W. Burnett.

Q. Do you remember on how many different occasions?

A. Well, I would say on three occasions.

Q. Do you remember on one occasion discussing with Mr. Burnett in which——

Mr. Ham: Objected to as a leading question.

Mr. McNamee: I withdrew that.

Q. Will you just state the nature of those discussions with Mr. Burnett, the time and place and who was present?

(Testimony of Thomas E. Eney.)

A. Well, the procedure of the general chairman is to negotiate a conference and there are seven general chairmen that represent the organization that I was connected with. Either the manager or the general chairman, the secretary of the Federation, would write them a letter when they were going to have a conference and they would reply and those conferences were where this took place.

Q. Do you remember what was discussed in any of those conferences?

The Court: Tell us what he said to Mr. Burnett and Mr. Burnett replied in those negotiations—to make a long story short.

Q. Yes.

A. We go into conference and each respective chairman has what we call grievance files. The company is advised in advance what [119] this case is. They have a personnel man and he makes a list of these grievances, then when we get into conference, we sit across the table and we discuss each man's question. At these conferences the request for return to service, that is for Olive, was made at that conference.

Q. And do you know what the result of the conference was?

A. Well, the result of the last conference I had in his case, if I recollect right, was that we called up on the telephone and got Mr. Olive on the phone and it was agreed between Mr. Burnett and I that he would go to Los Angeles for examination and that I requested Mr. Burnett the only way he could go



(Testimony of Thomas E. Eney.)

there I wanted one of our committee men present at the examination. That was finally agreed to. He went down and was examined and I was informed by the representative, Mr. Crier, that he passed everything OK and he was to return to Las Vegas and accept employment.

Q. And accepted employment, you say?

A. I say he was to return to accept his employment at Las Vegas. That was my understanding with the management.

The Court: Do you know why he didn't?

A. Well, I would say—he was concerned about the adjustment of the time that was involved, the compensation involved of him being out of employment at the time.

The Court: Well, was there anything said between you and Mr. Burnett to the effect that he was not to receive the compensation for time off? [120]

A. Well, I made demands on the company, my letter states there, from 1935. However, they wouldn't accept that but they did agree that he could return to service and we could subsequently go in and determine how much the value of the time lost would be.

The Court: Did Mr. Olive refuse to proceed with that?

A. He evidently did. He isn't working.

The Court: I know, but you communicated that fact?

A. Yes, sir.

Mr. McNamee: Cross-examine.

(Testimony of Thomas E. Eney.)

Cross-Examination

By Mr. Taylor:

Q. What was the date of his trip to Los Angeles, Mr. Eney?

A. I couldn't really give you the date.

Q. Approximately when was it?

A. We have a record there.

Q. Will you refresh your memory when and tell us the approximate date when you insisted upon your committee man going down?

A. I think it was subsequent to June, either 4th or 6th, of 1938.

Q. You say it was the 4th or 6th of June, 1938?

A. I am not sure.

Q. You have means of refreshing your recollection, haven't you?

A. I have no files here because I am not in position to have the files any more. I am not in position of general chairman.

Q. When is the last time you communicated with Mr. Olive?

A. It was after that conference.

Q. Have you any means of getting the information upon which to [121] refresh your memory?

A. Not now. You see I am requested—when I resigned my position, I had to turn my files over to the other man succeeding me. That is the law of the Committee.

Q. How can you get the information to definitely refresh your memory?

A. I would have to go in there and get those files.

(Testimony of Thomas E. Eney.)

Q. In where?

A. Omaha, Nebraska.

Q. To be exact, directing your attention to a time in October, 22nd, 1937, couldn't that have been the time that he was ordered down to surgeon Fagen's office in Los Angeles, don't you think probably about that time? Mr. Olive has testified he was at Dr. Fagen's office about that time.

A. Did he testify Mr. Crier was with him?

Mr. Taylor: I don't recall.

Q. And again he was there may 27, 1938. Could it have been that time?

A. Well, if it was the time that Mr. Crier was there, that was the time. I think he admitted this morning that Mr. Crier was with him on one occasion.

Q. If Mr. Olive would say Mr. Crier was with him, then that would be the time, is that true?

A. Wel, I presume it would be true? I would take his word for it.

Q. Well, that would be your best opinion? [122]

The Court: We are going to use this man's memory on somebody else. What he remembers, if he can remember, to fix a date, that is all right, but he is basing his testimony on his memory, not what somebody else tells him.

Mr. Taylor: I am in a bad situation, your Honor, he apparently doesn't recollect.

The Court: I realize the man's memory, by his own statement, is not very good. His answer is if

(Testimony of Thomas E. Eney.)

Mr. Olive said that he was, "I will take his word for it." Well, that is not evidence.

Q. Then did you shortly after that communicate with Mr. Olive?

A. I ordered my secretary to communicate. Usually the local chairman—you don't deal directly with the person that makes the complaint; you deal with the committee.

Q. Did you after that communicate with Mr. Olive? A. I am almost sure that I did.

Q. Do you remember the means of communication you used?

A. I used to write on an average of 60 letters a day and I couldn't really tell you whether it was a letter or telegram.

Q. It might have been either. Do you remember how soon after that trip you communicated with him?

A. Well, I communicated with him just as soon as Mr. Crier informed me.

Q. Can you remember the time?

A. I would say a couple of days. [123]

Q. Do you remember where you were at the time you communicated with him?

A. I think I was in Salt Lake City.

Q. It could have been at Omaha, couldn't it?

A. Possibly.

Q. Now I will call your attention to what is marked Plaintiff's Exhibit 7 for identification and ask you if that is copy of the wire that you sent?

A. I do not deny the existence of that wire.

(Testimony of Thomas E. Eney.)

Q. You say that perhaps you send that wire. That is your name, there, isn't it?

A. I would think so.

Mr. Taylor: I now offer this into evidence as Plaintiff's Exhibit 7.

Mr. McNamee: I didn't hear what the witness said.

Mr. Taylor: He said he thought that was the wire. He acknowledged it.

Mr. McNamee: We have no objection.

The Court: It may be admitted.

Clerk: Plaintiff's 7.

Mr. Taylor: (Reads.)

“1938 May 30 AM 11 56

“S25 25—Omaha Nebra 30 12 1 P

“Williard L Olive

“Understand You Have Passed Examination. Ready to Restore You to Work Immediately on the Basis of No Compensation for Time Lost. Advise If You Concur.

“THOMAS J. ENEY.” [124]

Mr. Taylor: That is all.

The Court: Will you explain that testimony with your telegram?

A. It begins to come to my memory now from the receipt of that telegram, that we held a conference on the subject of returning him to service and it was agreed with the management that we would

(Testimony of Thomas E. Eney.)

put him back, pending the suit of his. I tell you the reason why, too. The organization, the committee board appealed over that statement and it was referred to them in the session and continuation in Ogden, Utah, and I was instructed to take the case up with the management further and get him back to employment and subsequently later take up the question of compensation.

The Court: And did you do that?

A. Yes, I wrote a letter to Mr. Burnett to that effect. I believe he read the letter.

The Court: Did the company then offer to do that?

A. They were agreeable for him to go back to work and discuss it later.

The Court: In your discussions concerning Mr. Olive's case, did you find any feeling or animosity that indicated the railroad company was trying to keep him out of service?

A. In my opinion as a general chairman, I did not find any antipathy against Mr. Olive. They were desirous of having him back on the job. The only question was the settlement of his claim. [125]

#### Re-Direct Examination

By Mr. McNamee:

Q. I will show you Defendant's Exhibit F, which purports to be a letter written by you under date of October 21, 1938, and ask you to state whether or not you wrote that letter?           A. I did.



(Testimony of Thomas E. Eney.)

Q. Is that the letter—does that refresh your recollection in regard to this?

A. Well, this is one that has been read here, isn't it?

Q. Yes.

A. It is October 21, 1938. I recognize the letter. I will admit the letter.

Q. Does that refresh your recollection as to whether or not there was any other transactions between you and Mr. Burnett in regard to Mr. Olive being permitted to return to work with the question of his pay to be discussed afterwards?

A. Well, it states in there about 1937: "You state that you are agreeable to returning Mr. Olive to service and that you will not assume any responsibility for Mr. Olive's failure to return to service since October, 1937."

Q. Well, Mr. Burnett says he won't assume any responsibility, but nevertheless was there any discussion between you and Mr. Burnett—

Mr. Ham: We object to that, if the Court please, as leading. This is his witness. It is certainly leading and suggestive.

The Court: It is leading. I think you had better let [126] the witness do the testifying instead of testifying for him.

Q. I will show you Defendant's Exhibit E and ask you to read it and ask you to state whether or not that refreshes your recollection as to the conversation or conference you had with Mr. Burnett?

A. That is correct.

(Testimony of Thomas E. Eney.)

Q. Now can you state just what the nature of those conferences were that you had with Mr. Burnett?

A. The conference was relative to returning Mr. Olive to service, putting him back on the job.

### Re-Cross Examination

By Mr. Taylor:

Q. Mr. Eney, in your letter to Mr. Burnett of October 21, 1938, you state the following:

“If, as Mr. Olive requests you will return him to service with compensation from May, 1935, up until the present time, he is agreeable to return to service. As you have refused this, he has been so notified and it is within his jurisdiction to determine his own responsibility.”

You meant by that, didn't you, to call Mr. Burnett's attention to the fact that he had refused to adjust his compensation, is that right?

A. I wouldn't say necessarily, no.

Q. Then what did you mean by this: “—he has been so notified and it is within his jurisdiction to determine his own responsibility.” [127] You meant to say, didn't you, that Mr. Olive could go to work and waive any compensation due him, or stand on his rights to collect his pay, wasn't that—

A. No, he didn't have to go to work and waive anything. He could have gone to work and then requested compensation after he returned to service.

(Testimony of Thomas E. Eney.)

Q. That is your conclusion, isn't it, but that isn't what you told him in this telegram?

A. I told him that they had refused at that time——

Q. You told him he could go to work if he waived any pay he had coming, didn't you; and this was the sense of the position that the railroad company made at that time, wasn't it, is that right?

A. I didn't get that question. I am not an attorney.

The Court: I think the question is argumentative, too, counsel. The documents speak for themselves.

Mr. Taylor: That is all.

Mr. McNamee: That is all.

The Court: How many more witnesses?

Mr. McNamee: If your Honor please, I don't know if we will have any more witnesses right now.

The Court: At this time we will take a recess until 10:00 o'clock tomorrow morning. The jury will bear in mind the admonition of the Court heretofore given and return at 10:00 o'clock tomorrow morning.

(Recess taken at 4:35 P. M.) [128]

Tuesday, March 20, 1945

10:00 A. M.

Attorneys present as at previous session. Presence of the jury stipulated.

The Court: You may proceed.

Mr. Taylor: I would like leave to recall Mr. Eney on cross-examination, if I might.

Mr. Eney, having been previously sworn, testified as follows:

#### Cross-Examination

By Mr. Taylor:

Q. Mr. Eney, you know Mr. Felix Knight?

A. Yes, sir.

Q. Who was he?

A. He is the general president of the Brotherhood of Railway Carmen of America.

Q. Now at some time or other you turned this record and file over to Mr. Knight, didn't you?

A. Yes, sir.

Q. Do you recall when that was done?

A. Well, I would say that was after June, 1938. Some time after that. I don't remember—probably in October.

Q. To refresh your memory, wasn't it about the first of July, 1938?

A. It is possible it was around that time. I couldn't say for sure because I have not now the correspondence.

(Testimony of Thomas E. Eney.)

Q. That is the best of your recollection? [129]

A. Well, it was subsequent to the convention that was held in Ogden, Utah.

Q. And what was the date of the convention?

A. June 8th, I think was the correct date.

Q. This is not your letter, but I show you what purports to be a copy of a letter from Mr. Knight to Mr. Thurmond and ask you if that probably indicates the true fact?

A. Well, this is a copy of the letter. I guess Mr. Thurmond has the original letter. I suppose Mr. Thurmond has the original letter. You can get it from him.

Q. You are familiar with Mr. Felix Knight's signature, aren't you?

A. I have been familiar with it.

Mr. Taylor: This is a little unusual, but Mr. Thurmond is in the court room under subpoena and the question about this letter at this time, I have not consulted Mr. Thurmond—I will inquire, with the Court's permission, if he has the original of this letter, if there is no objection.

(Counsel consults with Mr. Thurmond.)

Q. I will call your attention to this letter and ask you if that is Mr. Knight's signature?

A. That is his signature. May I read this letter?

Mr. Taylor: Yes, surely.

Mr. McNamee: We object on the grounds it is incompetent, irrelevant, and immaterial, and also hearsay.

The Court: The letter is from whom? [130]

(Testimony of Thomas E. Eney.)

Mr. Taylor: It is from Mr. Knight, the officer——

The Court: To whom?

Mr. Taylor: To Mr. Thurmond. Mr. Knight was an officer of the——

The Court: Why wouldn't it be admissible, counsel?

Mr. Taylor: Maybe if I explain to your Honor——

The Court: I don't want the substance of the letter brought out before the jury, but a letter between third parties is not——

Mr. Taylor: May I explain the purpose of the offer, if your Honor please?

The Court: It isn't the question of purpose, but here is a letter this witness didn't write and he certainly isn't in a position to recognize that letter either one way or the other. The contents of the letter may be admissible through the other witness, but not through this witness. You might ask him questions as to the knowledge of certain things that that letter contains, without reading it. I make that as a suggestion. I want to help both sides.

Q. Refreshing your memory—you have read this letter I handed to you?

A. Yes.

Q. Refreshing your memory from that, does this aid your memory at all, does this assist you in refreshing your memory as to [131] when you turned the file over to Mr. Knight?

A. What date? I can't tell because I handled a vast amount of correspondence there. I see it ac-



(Testimony of Thomas E. Eney.)

knowledges receipt of his communication relative to the file. He doesn't state there what date he received it, does he?

Q. No, but it is entitled—yes, he indicates 5th.

A. If that explains what date he received it; that explains when he received.

Q. Yes, then using this as a basis——

The Court: May I see the letter?

(Court reads letter to himself.)

The Court: It seems to me that this letter is innoxious except for establishment of the date. I do not see any serious objection to it. Does that help you to fix in your mind—would you say that was about the date?

A. Well, he says he received here on the 5th, a communication from Mr. Thurmond, but it doesn't state that that file went in. The communication was directed by Mr. Thurmond to Mr. Knight.

The Court: That was when you stepped out of office?

A. No.

The Court: You were still in?

A. General chairman, but Mr. Knight is the head of the whole organization.

The Court: In other words, that file was forwarded to him?

A. That is right, but it does not state in here——

The Court: Well, it was about that time, would you say?

A. Well, I couldn't say. I presume it would be about that time. Mr. Thurmond would be better able

(Testimony of Thomas E. Eney.)

to tell you. This is dated July 9th and acknowledges the receipt of his letter of the 5th, so prior to the 5th he had received the file.

Q. After that file was turned over, your activities on behalf of Mr. Olive ceased, didn't they, at that time? You had nothing more to do with, you turned it over to Mr. Knight? A. Yes.

Q. That was July of 1938, wasn't it?

A. I think—well, whatever the date states there.

The Court: It states it was July, 1938, the fore part of July.

Q. Mr. Eney, do you recall an incident about April 30, 1938, when you were at Los Angeles and you received a wire from Mr. Olive regarding his case? To refresh your memory, I will call your attention to what purports to be a copy——

The Court: Counsel, the letters that you offer I suggest that you mark for identification.

Mr. Taylor: Very well, sir.

A. This is just a copy of the telegram.

Q. My question is, did you receive a wire, of which this is a copy, or a wire of similar import to this copy, to the best of your recollection?

A. I couldn't say that I did.

Q. You don't remember? [133]

A. I don't remember that because I received many telegrams.

Q. You wouldn't say that you didn't receive such a wire?

A. It is possible I received a telegram that date, but I couldn't say as to that particular one, because

(Testimony of Thomas E. Eney.)

I might have been in conference at Omaha and they might have delivered the message.

Clerk: Plaintiff's Exhibit 8 for identification.

Mr. Taylor: I desire to reframe this question.

Q. Mr. Eney, will you state whether or not, on or about the 30th day of April, 1938, you received a wire—now, I do not want to read the wire—I believe I can do it this way——

The Court: Mr. Olive is in position to testify to anything he sent, so you might as well read it when he takes the witness stand.

Mr. Taylor: Very well.

Q. State whether or not, on or about April 30, 1938, you received a wire from Mr. Olive, reading as follows: "You have not answered my last letter wherein I asked for a complete review of my case by the Grand Lodge and their decision in black and white. You have not personally advised me of your decision and I want that in writing from you personally before I sign anything. Is it not possible to handle my case like other local cases are being handled, and that is to let me return to work and the subject of time lost discussed at the leisure of others concerned. Answer return wire. W. L. Olive, 515 Carson Street." Did you receive such a wire as that from Mr. Olive? [134]

A. I couldn't say I did.

The Court: As I understand your testimony, you may have received it?

A. May have and may not, your Honor. I re-

(Testimony of Thomas E. Eney.)

ceived many messages in my travels. I get into a town and I probably receive five or six.

Q. I will call your attention to this letter and ask you if that is your signature?

A. That is my signature.

Mr. Taylor: I offer the letter of June 30, 1938, from Mr. Thomas J. Eney to Mr. W. L. Thurmond and ask it be marked Plaintiff's Exhibit——

Clerk: 9.

Mr. Taylor: (Reads.)

“Joint Protective Board, Union Pacific Railroad  
Brotherhood Railway Carmen of America.

Office of Thomas J. Eney, General Chairman,  
1026 W.O.W. Building, Omaha, Nebr.

June 30, 1938.

“W. L. Thurmond, Local Chairman  
Local Lodge No. 612  
226 South 6th Street  
Las Vegas, Nevada

“Dear Sir and Brother:

“This will acknowledge receipt of your letter of June twenty-first with a copy to the executive board members the case of W. L. Olive.

“Management has refused to reinstate W. L. Olive unless he withdraws claim for compensation. Therefore, the only alternative for me, is to place same in

(Testimony of Thomas E. Eney.)

the hands of the Grand Lodge for [135] their disposal to the adjustment board.

“Fraternally yours,

THOMAS J. ENEY,

General Chairman, J.P.B.”

Q. Referring, Mr. Eney, to the letter which has just been introduced and which I just read to the jury, that letter conformed to the probable facts at that time, didn't it?

A. Well, to the extent that what it was written, what it says in that letter that——

Q. That is, you stated the truth in that letter?

A. Well, the only thing that I could never determine just exactly how much money was involved in the case.

Mr. Taylor: I do not believe that is responsive.

Q. You stated the truth, Mr. Eney, to Mr. Thurmond at that time?

A. All right. The letter speaks for itself.

Q. You wouldn't try to mislead Mr. Thurmond, would you?

Mr. McNamee: That is objected to.

The Court: He has written the letter. His signature is there, counsel. The letter speaks for itself.

Mr. Taylor: That is all.

Mr. McNamee: That is all.

The Court: I would like to know what explanation you have to make about this letter in your testimony of yesterday.

(Testimony of Thomas E. Eney.)

A. Well, the amount what is involved, whether it would satisfy the claimant, is the question at issue.

The Court: But you said in this letter the company would not reinstate this man unless he waived compensation for back pay. You stated yesterday, if I remember correctly, in effect that the company offered to reinstate him and that the question of back pay would be adjusted in regular course.

A. There was a statement——

Mr. McNamee: That letter that is on file is October, 1938.

The Court: I am asking the witness a question, counsel.

Mr. McNamee: Pardon me.

A. You see after I handle the case so far and I can't get any satisfaction out of it, the question was brought before this convention in appeal by Mr. Thurmond and one of the Grand Lodge officers was present there and we went into it very thorough and I was instructed to handle it to a conclusion and that on the basis for compensation for time lost in 1935, as that previous letter stated. Well, my instructions were then to get that full amount and I can't get it according to that request at that convention, so it was a matter then for me to turn it over to the Grand Lodge. In the meantime, the company contacted me again on the case. It is a procedure, your Honor, that you have to follow out in these offices that you hold in these labor organizations. You can't do as you please about it. You are regulated by the orders of the organization. [137]



(Testimony of Thomas E. Eney.)

The Court: That is all. Any further questions?

Mr. McNamee: That is all, Mr. Eney.

Mr. Taylor: That is all.

Mr. McNamee: Your Honor please, at this time we offer what purports to be an instrument dated——

The Court: Purports to be—I want to know if it is.

Mr. McNamee: An instrument dated—signed by Williard L. Olive——

Mr. Ham: We object if it is read before the jury.

The Court: The authenticity is not questioned?

Mr. Ham: It is just a question of materiality to the issues in this case. We object to that introduction upon that ground, that it is immaterial to the issues of this case.

The Court: I will overrule the objection. Gentlemen, there has been a claim of injury here, that this man is taken out of service on account of injuries received. Now it seems to me that there is evidence of the fact that he was injured and from that the jury can determine the extent. In other words, as I view this case, there were certain periods here in which you gentlemen are in conflict as to when the plaintiff was able to return to work. Now the plaintiff claims that he was able to return to work, I believe, in 1935. According to the opening statements of counsel for the defendant, he was not able to return to [138] work until 1937. Now that is a question of fact for the jury

to determine from all the evidence. If, in other words, if we should make an award here it should be made from the year 1935 or the year 1937 and the extent of his injuries and I think to determine that fact, the jury should have that information. Therefore, the objection will be overruled.

Mr. McNamee: I would like to be permitted to substitute for the original a photostatic copy thereof.

The Court: Any objection?

Mr. Ham: No objection to the substitution without waiver of the original objection.

Clerk: Defendants' "G".

The Court: That is understood.

Mr. McNamee: At this time, if your Honor please, we desire to introduce two requests for admission to facts, one of which has a response to it.

The Court: I understand there is no objection to it?

Mr. Taylor: No, no objection to the one that has a response.

The Court: It may be admitted.

Mr. McNamee: Request for Admission of Facts dated February 21, 1945 and receipted for that date, together with Response to it.

The Court: It may be admitted as one exhibit.

Clerk: Defendants' "H".

The Court: I think the Admission should be read to the jury now so we will know what we are talking about.

Mr. McNamee: At this time I want to read to the jury Defendants' Exhibit "G". The top of

the instrument is in the name of the Union Pacific System. It is entitled, "Release of All Claims." (Reads)

"Received of Los Angeles & Salt Lake Railroad Company Five Thousand Dollars (\$5,000.00)

"In consideration thereof, I hereby release Los Angeles & Salt Lake Railroad Company and all other companies, partnerships and persons from all claims or causes of action that exist or may hereafter accrue, for damages for any and all personal injuries, including possible unknown injuries, and for complications arising from such injuries or treatment thereof; for loss of services; for medical or other expenses; and for loss and damage to property; growing out of an accident occurring on or about twenty-fifth day of February, 1934, at or near Las Vegas, Nevada, resulting in personal injuries to me while a Car Inspector.

"The above amount is the full consideration for this settlement, and no promise or contract of future employment has been made. [140]

"I Have Read the Foregoing Receipt and Release and Fully Understand the Same. I have read the foregoing receipt and release and fully understand the same.

"Dated Las Vegas, Nevada, May 4th, 1935.

(Signed) WILLARD L. OLIVE

Las Vegas, Nev May 4th 1935

"Witnesses: Mary Carol Melton, C. C. Boyer Jr, John R. Emplun, M. L. Clark 5/4/35"

This is a Request for Admission of Facts, addressed to the plaintiff and plaintiff's attorneys, Exhibit "H":

(Reads) "Please Take Notice: That the Defendants, Union Pacific Railroad Company, a corporation, Los Angeles & Salt Lake Railroad Company, a corporation, and Willard T. Morley, request the Plaintiff, W. L. Olive, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, to-wit:

"That each of the following statements is true.

"I.

"That throughout the months of December, 1936 and January, 1937, one L. R. Jarrett was Vice Chairman of the Local Protective Board of Brotherhood Railway Carmen of America, at Las Vegas, Nevada.

"II.

"That throughout the year 1937, one W. L. Thurmond was Chairman of the Local Protective Board of Brotherhood Railway Carmen of America, at Las Vegas, Nevada.

"III.

"That at all times between November 1, 1934, and December 31, 1938, one Thomas J. Eney was [141] General Chairman of Brotherhood Railway Carmen of America.

## “IV.

“That before the commencement of this action, Plaintiff’s case for his claimed unlawful suspension from service and discharge from service, by the Defendants, was, at Plaintiff’s request and pursuant to Rule 35 of Agreement dated November 1, 1934, marked Exhibit “A” and made a part of Plaintiff’s Complaint, taken to the Foreman, General Foreman, and Master Mechanic, each in their respective order, by the authorized local Committee of said Brotherhood Railway Carmen of America, which Committee was also known as and called “Local Protective Board of Brotherhood Railway Carmen of America”, and that said L. R. Jarrett, W. L. Thurmond, and Thomas J. Eney, were respectively, the representatives of said local Committee.

“Dated this 21 day of February, 1945.

“LEO A. McNAMEE

FRANK McNAMEE, Jr.

By (Signed) LEO A. McNAMEE

Attorneys for Defendants.

“Receipt of a copy of the foregoing Request for Admission of Facts, admitted this 21 day of February, 1945.

“HAM & TAYLOR

By (Signed) RYLAND G. TAYLOR

Attorneys for Plaintiff.”

In response to that the plaintiff admits statements I, II, and III. (Reads.)

## “II.

“In response to statement IV Plaintiff admits that Thomas J. Eney was a representative of the Local Protective Board of Brotherhood Railway Carmen of America. Plaintiff states that on November [142] 5, 1936, he submitted his case to the Local Protective Board of Brotherhood Railway Carmen of America and Plaintiff is informed that the said Board reported the case to the General Foreman and Master Mechanic but Plaintiff alleges that his claim was not given an investigation by the said General Foreman or Master Mechanic nor was he given any hearing whatsoever or at all.

“HAM & TAYLOR

By (Signed) RYLAND G. TAYLOR

Attorneys for Plaintiff.”

At this time, if your Honor please, defendants offer “Request for Admission of Facts Pertaining to the Third Defense set forth in the Answer.”

Mr. Taylor: A request we admit the qualifications of the corporation during that period as set forth in the third defense. The third defense was stricken. Your Honor sustained the motion to strike as to the third defense.

The Court: I simply held it was within the statutory period. This action was based upon a contract in writing and therefore the statute of limitation I am not going to follow. I held it is within the statutory period.

Mr. Taylor: And secondly this admission or



denial would be immaterial because it goes solely to the third defense. [143]

The Court: It may be admitted and marked. In other words, it follows your allegation as to the corporation——

## DEFENDANT'S EXHIBIT "I"

### REQUEST FOR ADMISSION OF FACTS

To: W. L. Olive, Plaintiff, and to Messrs. Ham & Taylor, Attorneys for Plaintiff:

Please Take Notice: That the Defendants, Union Pacific Railroad Company, a corporation, Los Angeles & Salt Lake Railroad Company, a corporation, and Willard T. Morley, request the Plaintiff, W. L. Olive, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, to-wit:

That each of the following statements is true.

#### I.

That prior to August 20, 1936, each of said Defendant corporations filed a certified copy of its Articles of Incorporation, and a certified copy of all of the Amendments thereto, in the office of the Secretary of State of the State of Nevada, and ever since prior to August 20, 1936, these Defendant corporations have each kept on file in the office of the Secretary of State of the State of Nevada, a certified copy of its Articles of Incorporation,

and a certified copy of all of the amendments thereto. That prior to August 20, 1936, said Defendant corporations also each filed a certified copy of its Articles of Incorporation, and of all amendments thereto, as certified by the Secretary of State of the State of Nevada, in the office of the County Clerk of the County of Clark, State of Nevada, in which County the principal place of business of each of said Defendant corporations in the State of Nevada, is located.

That prior to August 20, 1936, each of said Defendant corporations appointed, and have ever since kept and maintained in the State of Nevada, a resident agent upon whom process may be served.

That on or before the 1st day of July of each of the years 1936, 1937, 1938, 1939, and 1940, each of the Defendant corporations filed with the Secretary of State of the State of Nevada, a list of its officers and its Directors of, and a designation of its resident agent, in the State of Nevada, and a certificate of acceptance signed by its resident agent so designated, which said list of officers and designation of resident agent was certified by one of its officers, and upon the filing of each of said lists, paid to the said Secretary of State, a fee of \$5.00.

Dated: This 2nd day of March, 1945.

LEO A. McNAMEE

FRANK McNAMEE, Jr.

By LEO A. McNAMEE

Attorneys for Defendants.

Receipt of a copy of the foregoing Request for Admission of Facts, admitted this 2 day of March, 1945.

HAM & TAYLOR  
By RYLAND G. TAYLOR  
Attorneys for Plaintiff.

No. 160. U. S. District Court, Nevada. W. L. Olive, Plaintiff vs. Union Pac. R. R. Co., et al. Deft's. Exhibit No. "I". Filed Mar. 20th, 1945. O. E. Benham, Clerk.

[Endorsed]: Filed March 20, 1945.

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Mr. McNamee: That is right.

The Court: And the plea of statute of limitations is based upon an oral agreement and therefore barred from statute of limitations. I hold that this is an action based upon a written contract and therefore the statute of limitation can not hold. It may be admitted.

Clerk: Defendants' "I".

Mr. McNamee: I would like to call Mr. Olive under the statute.

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MR. OLIVE,

having been previously sworn, testified as follows:

Direct Examination

By Mr. McNamee:

Q. When you were injured in February, 1934,

(Testimony of W. L. Olive.)

Mr. Olive, what did that injury consist of?

A. I don't know exactly. I sustained a broken arm and pretty badly shaken up.

Q. Were you treated? A. Yes sir.

Q. By the company doctors? A. Yes sir.

Q. Were you taken into Los Angeles to the hospital? A. Yes sir. [144]

Q. How long were you in there?

A. Six weeks.

Q. And then you returned to Las Vegas and how long was your arm in a sling?

A. Oh, it was about six weeks in Los Angeles and six weeks in Long Beach and then I came back here. I carried it in a sling for four months.

The Court: What part of your arm was broken?

A. The upper humerus.

Q. Did the doctors tell you just what that fracture was called?

A. Compound fracture, he told me.

The Court: Did it involve the elbow anywhere?

A. Yes.

The Court: Was the break in the elbow?

A. It was just midway between the elbow and shoulder and there was restriction in the elbow for quite some time. It finally left so that I can use it all right.

The Court: Do you have the same good use of it now as you ever had?

A. Yes sir.

Q. Did they ever call it a comminuted fracture?

A. Not that I recall.

(Testimony of W. L. Olive.)

Q. You didn't hear it called that? A. No.

Q. They called it a compound fracture?

A. Yes. [145]

Q. Was your back injured at the same time?

A. Yes, I was pretty badly shaken up.

The Court: Did you fall?

A. I fell from the top of one of their cars.

The Court: Box car?

A. Passenger car.

Q. You fell clear from the top down to the platform? A. Yes sir.

Q. Did it cause you to be nervous also?

A. Yes sir.

Mr. McNamee: I think that is all.

Mr. Taylor: No cross-examination.

The Court: Did you have any lawsuit with the railroad company for this settlement or did you finally get together yourselves?

A. Why we negotiated a favorable settlement, wherein I was to return to work and I received half of the amount that I had originally asked for, which was \$10,000.00 and I expected to return to work.

The Court: But you didn't have any lawsuit or any disagreement with the company?

A. No.

The Court: You had a peaceful adjustment?

A. No.

The Court: So there was no hard feelings between you and the railroad company over this accident? [146]

(Testimony of W. L. Olive.)

A. That is right, sir.

Q. You say that there was an agreement that you return to work but that statement you signed said there wasn't any such promise to return to you to work.

The Court: That is argumentative, counsel.

Mr. McNamee: That is all.

Mr. Taylor: That is all. [147]

Mr. McNamee: I wish to recall Mr. Knickerbocker.

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### MR. KNICKERBOCKER,

having been previously sworn, testified as follows:

#### Direct Examination

By Mr. McNamee:

Q. Mr. Knickerbocker, in regard to employees passing physical examinations, what was the rule of the company as to who should pass on their physical ability?

Mr. Taylor: We object upon the grounds and for the reason that the rule itself is the best evidence.

The Court: If it is a written rule. Are the rules in evidence?

Mr. McNamee: Yes.

The Court: It is the best evidence.

Mr. McNamee: The rule states that they must pass satisfactory examination and I just wanted to



(Testimony of F. H. Knickerbocker.)

know who must state whether or not the examination is satisfactory.

Mr. Taylor: His Honor has stated the rule is the best evidence.

The Court: The rules speak for themselves, counsel.

Q. I will ask you to state, Mr. Knickerbocker, whether or not the railroad company would accept the report of a doctor other than the railroad company doctors?      A. No sir.

Q. How many doctors did the railroad company have at that time?

Mr. Taylor: That is immaterial.

The Court: A big railroad company has lots of doctors. [148]

Mr. McNamee: Well, that is all.

The Court: Any questions?

Mr. Taylor: Just a moment.

Cross-Examination

By Mr. Taylor:

Q. In other words, you wouldn't accept the opinion of any doctor, even your own family physician, if he is not a railroad doctor?

A. Under the rules——

Q. That isn't the question. I asked you if you would, as a matter of practice, accept the opinion of any doctor other than a railroad company doctor?

A. No sir.

Mr. Taylor: That is all.

Mr. McNamee: That is all. Defendant rests.

## REBUTTAL TESTIMONY

## MR. OLIVE

was called on rebuttal, and having been previously sworn, testified as follows:

## Direct Examination

By Mr. Taylor:

Q. Mr. Olive, referring to your examination by Dr. Landenberger in Salt Lake City in October of 1935, briefly of what did that examination consist?

A. Well, he examined my eyes and my ears and examined my arm and blood pressure and then asked me if I felt I was able to go back to work and I believe I answered him yes, that I was. He asked me if my arm was all right and I chinned myself on his door frame. He said, "I guess it is all right." He said however I should take a routine examination from Dr. Slavin when I returned to Vegas.

Q. Do you recall on or about April 30, 1938, sending Mr. Eney a telegram addressed to Los Angeles?

A. Yes sir.

Q. I will call your attention to this copy here and ask you if that is a copy of the wire you sent to Mr. Eney?

A. It is sir.

Mr. McNamee: We object, if your Honor please. It is apparently a dispute between the plaintiff and his labor organization and I do not think the railroad company should be penalized for any neg-

(Testimony of W. L. Olive.)

lect or failure to carry out the procedure prescribed—— [150]

The Court: Counsel, it has already been read to the jury.

Mr. McNamee: I object to that letter going in.

The Court: It is already in because it has been read.

Mr. Taylor: The purpose of the offer if——

The Court: I am going to admit it.

Clerk: Plaintiff's 10.

## PLAINTIFFS' EXHIBIT NO. 10

No. 48.

### Telegram

Nite Letter to Thos. J. Eney to Los Angeles  
April 30th, 1938.

You have not answered my last letter wherein I asked for a complete review of my case by the Grand Lodge and their decision in black and white.

You have not personally advised me of your decision and I want that in writing from you personally before I sign anything.

Is it not possible to handle my case like other local cases are being handled and that is to let me return to work and the subject of time lost discussed at the leisure of others concerned.

Answer return wire.

W. L. OLIVE

515 Carson. [44]

(Testimony of W. L. Olive.)

The Court: It has already been read, counsel.

Mr. Taylor: Very well, sir.

Q. Mr. Olive, do you still want to return to your work, employment?

Mr. McNamee: Objected to as incompetent, irrelevant, and immaterial.

Mr. Taylor: State of mind is involved all through this case, if your Honor please.

Mr. McNamee: Well, there are several things involved, if your Honor please. At this time now he has brought an action here claiming that he has been discharged and that the agreement is all over. Consequently, it is immaterial whether he wants to go back to the railroad company now or not.

The Court: The action is on the assumption that his employment is terminated. I am going to sustain the objection to the question.

Mr. Taylor: That is all.

The Court: Any questions?

Mr. McNamee: No cross-examination.

The Court: That is all. [151]

Mr. Taylor: I would like to call Mr. Thurmond.

MR. W. A. THURMOND,

being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Please state your name, Mr. Thurmond.

A. William A. Thurmond.

Q. Where do you reside?

A. 225 So. 6th Street.

Q. Here in Las Vegas? A. Las Vegas.

Q. What is your occupation?

A. At the present time is wrecking engineer and locomotive carpenter.

Q. For the Union Pacific Railroad?

A. Yes sir.

Q. Are you a member of the Brotherhood of Railway Carmen of America? A. Yes sir.

Q. During the years 1934, 5, 6, 7, and 8 were you at that time a member of that Brotherhood?

A. Yes sir.

Q. Were you an officer of the Local organization during that period? A. Local chairman.

Q. I invite your attention to what purports to be a copy of a telegram sent by you to Mr. Eney on December 28, 1937, and ask [152] you if by reading that copy it refreshes your memory and you can state then whether or not you sent such a wire to Mr. Eney? A. Yes sir, I did.

Mr. McNamee: We object to that, if your Honor please, on the ground it is between the plaintiff and his agent and is not binding upon the defendants.

(Testimony of W. A. Thurmond.)

Mr. Taylor: It is an impeachment of the statement made by the witness Eney yesterday, tends to an impeachment.

The Court: Wherein is this an impeachment of the testimony of Mr. Eney?

Mr. Taylor: Mr. Eney wasn't definite as to time——

The Court: As I remember his testimony it was in the fall of 1938. He testified, if I remember correctly, that there was a period of time that the company would not take back Mr. Olive without a waiver, but that in the fall of '38, I believe he gave the month as October, that the company at that time agreed to take Mr. Olive back and this is dated 1937. I don't see where this impeaches his testimony in any way, counsel. However, I am going to admit it. I will let the jury pass upon that question.

Clerk: Plaintiff's 11.

The Court: Any further questions?

Mr. Taylor: If your Honor please, I overlooked reading this to the jury. This, gentlemen, is Plaintiff's Exhibit 11. [153]

(Reads)

“Las Vegas Nevada December 28 1937

“T J Eney

Rome Hotel

Omaha Nebraska

“Norton Requested Conference With Local Committee Today Case W L Olive Stop Norton Willing



(Testimony of W. A. Thurmond.)

Reinstate But Requested Signatures Olive and  
Committeemen on Waiver of Wage Claim Stop  
Mr Olive Willing Make Some Concession on Wage  
Settlement Provided He Is Returned Service Im-  
mediately Letter Following

W L THURMOND''

The Court: Any questions?

Mr. McNamee: No cross-examination.

The Court: That is all.

Mr. Taylor: Plaintiff rests.

The Court: Both sides rest now?

Mr. McNamee: Both sides rest now.

The Court: We will take a 5-minute recess at  
this time. Gentlemen of the jury, you will bear  
in mind the admonition of the Court heretofore  
given.

(Recess taken at 11:09 A. M.)

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11:20 A. M.

The Court: It is now 11:20. I am going to  
allow three-quarters of an hour for each side to  
argue but they may divide that up as they see fit.

At 11:55 jury admonished and recess taken until  
2:00 P. M. [154]

In Chambers—2:08 P. M.

Attorneys present.

The Court: Let it appear that counsel for the defendant excepts to the instructions wherein I have stated, among other things, that "If you find from the evidence that during plaintiff's employment with said defendant railroad companies, that said railroad companies had in effect a rule providing that employees who have been disabled by reason of accident, which predisposes them to sudden incapacity, must pass a satisfactory physical examination before resuming duty, and if you further find that plaintiff had an accident on the 25th day of February, 1934, which resulted in an injury to him which at that time incapacitated him from performing the duties of railway carman, and if you further find that he was examined by doctors \* \* \*," the defendant excepts to this instruction on the ground that I failed to give the instruction "railroad company doctors" and that it is the defendants' position that the plaintiff had to be passed by the railroad company doctors and that the Court can so instruct. Also excepts for the failure to give requested D10 and the Court's ground for refusing that is that it is covered by other instructions.

2:12

Presence of the jury stipulated.

Argument proceeds. [155]

## INSTRUCTIONS

The Court: Members of the jury, you have listened to the evidence, you have listened to the arguments of counsel, and now you are going to have to listen to me for a while, while I give you instructions governing the law of this case as I understand it.

It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus invested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law as stated to you.

The burden of proof in this class of case is always upon the party holding the affirmative. Any matter asserted by one party and denied by the other can only be proved in law by a preponderance of the evidence and the Court instructs you, as a matter of law, that the burden of proof is upon the plaintiff and it is upon him to prove his case by a preponderance of the evidence.

You are the sole judges of the credibility of witnesses and of the facts in this case. You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration

of a lesser number of witnesses or a presumption or other evidence which appeals to your mind with more convincing force. This [156] rule does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing side. It means that the final test is not the relative number of witnesses, but it is the relative convincing force of the evidence.

In every civil action, as this one is, the burden is on the plaintiff to prove his case by a preponderance of the evidence. Preponderance of the evidence means the greater weight of the creditable evidence as you find it to be. In your final estimate, this evidence is equally balanced as to the important facts. On the other hand, any preponderance of the evidence, however, slight, in the plaintiff's favor requires a verdict favorable to him.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute of the record without an inference or presumption and which in itself if true, conclusively establishes the fact. Indirect evidence is that which tends to establish the fact in dispute by providing another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions

and inferences. A presumption is a deduction which the law expressly directs to be made from particular facts. Unless it is declared by law, it may be controverted [157] by other evidence, direct or indirect, but unless so controverted, the jury is bound to find according to the presumption. An inference is an assumption which a reasonable jury draws from the facts proved. This must be founded upon a fact or facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the persons whose act is in question, the course of the business or course of nature. The word "propensity" as used in this instruction means "natural or habitual inclination or tendency."

A fact proven to your satisfaction by proof of circumstances from a consideration of various items of indirect evidence, is nonetheless as effectively established as though it depended upon direct evidence. Such circumstances must be connected in such a way as to confer and lead directly to the conclusion which may be indicated thereby.

If, after consideration of all the evidence, you conclude that any witness has sworn wilfully, falsely, as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony, insofar as the same is not corroborated by other credible evidence or by facts and circumstances in the case.

The Court instructs the jury that the following facts must be taken as true in this case: That for a

period of more than 10 years immediately prior to January 1, 1935, plaintiff had been employed by Los Angeles & Salt Lake Railroad Company as a car [158] repair man and car inspector at Las Vegas, Nevada. On the first day of November, 1934, while so employed, plaintiff was a member of the labor organization known and called the Brotherhood Railway Carmen of America; that on November 1, 1934, the Brotherhood Railway Carmen of America was a recognized and authorized bargaining agent for the carmen employees of the defendant railroad companies, respectively. That on the first day of November, 1934, said Brotherhood Railway Carmen of America entered into an agreement in writing the Los Angeles & Salt Lake Railroad Company and Union Pacific Railroad Company, a copy of which has been introduced in evidence and made a part of the evidence herein, which said agreement set forth rights and duties of said corporation and the said Brotherhood Railway Carmen of America, and that said agreement, among other things, provided as follows:

No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found



that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal. (Rule 37)

No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, [159] neither shall an employe be discharged for any cause without first being given an investigation. (Rule 38).

That from about February 1, 1934, to about January 1, 1936, Dr. Hale B. Slavin was the local doctor in Las Vegas, Nevada, for the Los Angeles & Salt Lake Railroad Company, and that from about January 1, 1936, to about January 1, 1939, said Dr. Hale B. Slavin was the local doctor in Las Vegas, Nevada, for Union Pacific Railroad Company, and the medical officer who was authorized to treat and administer to the local company employees. That from about January 1, 1935, to about January 1, 1937, Dr. J. C. Landenberger of Salt Lake City, Utah, was an authorized doctor for the Union Pacific Railroad Company, a corporation, and authorized to examine, treat and administer aid to employees of the Union Pacific Railroad Company. That from about January 1, 1936, to January 1, 1937, a Dr. Brown was an authorized doctor for the Union Pacific Railroad Company, and on or about March 20, 1936, one W. Maydahl was a car foreman in the local Las Vegas shops of the Union Pacific Railroad Company, and on or about October 20, 1936, one G. H.

Berry was a master mechanic for the Union Pacific Railroad Company, and that on or about October 20, 1936, Mr. F. H. Knickerbocker was an official of the Union Pacific Railroad Company. That throughout the month of December, 1936, to January, 1937, one L. R. Jarret was Vice-Chairman of the Local Protective Board of Brotherhood Railway Carmen of America at Las Vegas, Nevada. That throughout the year 1937, one W. L. Thurmond was Chairman [160] of the Local Protective Board of Brotherhood Railway Carmen of America at Las Vegas, Nevada. That at all times between November 1, 1934, and December 31, 1938, one Thomas J. Eney was General Chairman of Brotherhood Railway Carmen of America.

That before the commencement of this action plaintiff's case for his claimed unlawful suspension from service and discharge from service by the defendant railroad company was at plaintiff's request, and pursuant to Rule 35 of Agreement, dated November 1, 1934, heretofore introduced into evidence, taken to the general foreman and master mechanic, each in their respective order, by the authorized local committee of the Brotherhood Railway Carmen of America, which committee was also known as and called Local Protective Board of Brotherhood Railway Carmen of America. That L. R. Jarret, W. L. Thurmond, and Thomas J. Eney were respectively the representatives of said local committee.

This last instruction has been given due to ad-

missions in the agreement between the parties as to certain facts that have been agreed upon and no proof is required of those facts admitted by the pleadings or stipulated to by the parties; therefore, that is the reason I stated that you must accept the former statement as true because the parties have stipulated or admitted in writing these facts.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. It is the duty of the jurors to deliberate and consult [161] with a view to reaching an agreement, if they can do so without violence to their individual judgment upon the evidence under the instructions of the Court. Each juror must decide the case for himself, but should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to change his views or opinions on the case when convinced that they are erroneous.

You are instructed that any finding or findings of fact made by you must be based upon a preponderance of the evidence legally admitted or on stipulation of the parties or derived from an inference or presumption which can be legally drawn by the fact or facts established by competent evidence.

As I have heretofore said, you are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. You may take into consideration their interest, bias, or prejudice, if any, their relationship to the parties and to the case, if any, the probability or improbability of the story

related by them and any and all other facts and circumstances in evidence which in your judgment may add to or detract from their credibility or the weight of their testimony.

If you find from the evidence in this case that the plaintiff had an employment agreement with the defendants as alleged in plaintiff's complaint and amendment thereto, and that the defendants, or either of them, wrongfully discharged plaintiff, as alleged, in violation of the terms of said agreement, then it is your duty to find for the plaintiff and assess such [162] damages as you find the plaintiff suffered as a result of such wrongful discharge not exceeding the sum of \$64,742.08, the sum paid for in the plaintiff's complaint.

Testimony taken by deposition should receive the same consideration and weight at the hands of the jury as if the witness had testified on the stand in your presence.

If you find from the evidence that the defendants wrongfully suspended or discharged plaintiff on or about the 20th day of October, 1936, and you also find that after said date the defendants offered to reinstate plaintiff in his same position without prejudice to plaintiff's rights under his original contract of employment, then I instruct you that plaintiff can not recover for any wages lost by him from the time of such offer of reinstatement without prejudice to any claims for lost time he might claim from his employer or employers.

In other words, ladies and gentlemen, there has

been a conflict here in the evidence and you have heard the evidence. If you believe the plaintiff in this case was offered reinstatement without prejudice in October of 1938, that would be the limit of the companies' liability. In other words, any claim he has after that date would be eliminated and you must eliminate it. It is based, of course, upon the theory that a man is supposed to return to work when his employment is offered to him.

As I stated in other instructions, if you find that the plaintiff was wrongfully discharged by the defendants, then I instruct you that it was plaintiff's duty to seek similar employment [163] elsewhere in the same locality and thereby save himself harmless if he was reasonably able to do so. But if the plaintiff was unable, after a reasonable time, to obtain employment in the same locality of a similar nature to that in which he was employed at the time of his discharge, then he was bound to seek and accept some other kind of work for which he was fitted, in order to mitigate or reduce his damages. In other words, it was the duty of the plaintiff in this case to seek other employment that he was capable of doing and thereby mitigate or reduce any claim for damages that he might have against the defendants.

If you find from the evidence that plaintiff was unable physically to perform the duties of carman with safety to himself and others, on account of the condition of his arm, then the defendants had the right to suspend him from such service during the period such inability existed.



If you find from the evidence that during plaintiff's employment with said defendant railroad companies that said railroad companies had in effect a rule providing that employees had been disabled by reason of accident, which predisposes them to sudden incapacity, must pass a satisfactory physical examination before resuming duty, and if you further find that plaintiff had an accident on the 25th day of February, 1934, which resulted in injuries which at that time incapacitated him from performing the duties of railway carman, and if you further find that he was examined by doctors from time to time thereafter, [164] who found in good faith that plaintiff was so disabled by reason of said injuries as to interfere with the proper performance of his duties with safety to himself and others, then I instruct you that defendants were not liable to plaintiff for suspending him from service during the time plaintiff was found in good faith by said doctors to be so disabled as to so interfere with the proper performance of his duties with safety to himself and others. In other words, during the time that the plaintiff was so disabled by reason of his physical condition that he was unable to properly perform his duties with safety to himself and others, he was not entitled to reinstatement and such period should be eliminated from your consideration in fixing damages, if you find the plaintiff is entitled to recover.

The fact that I have instructed you on the subject of damages and submitted for your consideration a form of verdict which refers to damages, if any you find, is not to be taken by you as an indi-



cation that I believe the plaintiff is entitled to recover. This is a question of fact for your determination under all of the evidence in the case considered in connection with the instructions given you by the Court as to the law.

It is the Court's duty to instruct you as to all the law applicable to this case. It is your duty to determine whether or not the plaintiff is entitled to recover, basing your conclusion on all the evidence that has been presented to you herein, and weighing it and considering it under the rules stated [165] to you in these instructions. Anything that I may have said in any instruction which I have given you is not to be regarded by you as in any way indicating the belief or lack of opinion on my part as to the existence or non-existence of any fact or circumstance which has been submitted to you for decision.

You entered upon your duties as jurors in this case by taking a solemn oath that you would a true verdict render according to the evidence. That duty and obligation are performed only when a verdict is rendered which is in accordance with the evidence. While you have a right to use your knowledge and experience as men in arriving at a conclusion as to the weight of evidence and credibility of witnesses, yet your finding and decision must rest upon and find support in the evidence alone. You have seen the witnesses, heard their testimony, will listen to the arguments of counsel and will have heard the charge of the Court. You must consider all of the evidence in connection with the law as given you and there-

from reach a decision. In so doing, you must patiently and conscientiously, without fear, favor or affection, bias, prejudice or sympathy, compare, weigh and consider all the facts and circumstances shown by the evidence, with the sole fixed and steadfast purpose of doing equal and exact justice between the plaintiff and defendants.

In approaching the question and retiring to your jury room, the first question that you are going to have to determine among yourselves is whether or not the plaintiff was improperly discharged. If you find that he was not, that ends your discussion. [166] If you find that he was improperly and illegally discharged, then it is for you to determine, first how long did that period exist? Was he offered employment in good faith and opportunity to return to work without the necessity of waiving any claim he might have or not? In other words, you are to determine first whether he was illegally discharged and the period of time over which that discharge exists. If you find it exists up to the present date or for any period of time, then it is for you to determine the amount. As a matter of fact, it is your duty, if you find for the plaintiff, to fix the amount. The point I am trying to impress upon you is the first necessity of determining whether or not the plaintiff was improperly or illegally discharged. If he wasn't, then of course that ends it. Plaintiff is not entitled to recover. If you then find he was improperly or illegally discharged, then it is for you to determine the amount of damages that will com-

pensate him as damages by reason of the illegal or unlawful discharge.

You are instructed if I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestions. I have not expressed or intended to express, nor have I intimated nor intend to intimate any opinion as to what witnesses are, or are not, worthy of credence; what facts are or are not established, or what inference should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to [167] any of these matters, I instruct you to disregard it.

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence, as to the credibility of a witness. In admitting evidence, to which an objection is made, the Court does not determine what weight should be given such evidence. As to any offer of evidence that was rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reasons for the objection.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

The verdict to be rendered must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. [168]

When you retire to your jury room to deliberate, you will select one of your number as foreman and he will sign your verdict for you when it has been agreed upon. You will then return into court with the verdict and your foreman will represent you as your spokesman in the further conduct of this case in this court.

Two forms of verdict have been prepared for your convenience. One reads as follows: We, the jury in the above-entitled action, find for the above-named plaintiff and against the above-named defendants and assess plaintiff damages at (blank) dollars. The other proposed verdict for your consideration is: We, the jury in the above-entitled case, find in favor of the defendants above-named and against the above-named plaintiff.

Any exceptions, gentlemen, outside of the one that has been heretofore made?

Mr. Taylor: None on account of the plaintiff, if your Honor please.

Mr. McNamee: None on account of the defendant.

(Jury retired at 3:10 P. M.) [169]

State of Nevada,  
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had and the testimony adduced at the trial of the case entitled, *W. L. Olive, Plaintiff, vs. Union Pacific Railroad Company, et al, Defendants*, No. 160, held in Las Vegas, Nevada, on the 19th and 20th days of March, 1945, and that the foregoing pages, numbered 1 to 122, inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, June 28, 1945.

MARIE D. MCINTYRE,  
Official Reporter.

[Endorsed]: Filed Sept. 11, 1945. [170]

[Title of District Court and Cause.]

### VERDICT

We, the jury in the above entitled action, find for the above named plaintiff and against the above named defendants, and assess plaintiff's damages at \$8675.40 Dollars.

Dated: March 20, 1945.

IRA J. EARL

Foreman.

Filed March 20, 1945. O. E. Benham, Clerk.

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[Title of District Court and Cause.]

### JUDGMENT ON VERDICT

This cause came on regularly for trial on the 19th day of March, 1945, Messrs. Ham & Taylor appearing as attorneys for the plaintiff and Leo A. McNamee, Esquire appearing as attorney for the defendants.

Thereupon a jury of twelve was duly selected, impaneled and sworn to try the said cause and witnesses on the part of the plaintiff and defendant were duly sworn and testimony introduced. After hearing the evidence, the argument of counsel and instructions by the Court, the cause was submitted to the jury on the 20th day of March, 1945, who



retired to deliberate upon their verdict, and subsequently returned into Court and being polled, answered to their respective names and then and there rendered the following verdict, which was accepted by the Court and entered on the minutes thereof:

### VERDICT

Therefore, by virtue of the law and by reason of the premises aforesaid:

It Is Ordered, Adjudged and Decreed: That the Plaintiff, W. L. Olive, have and recover from the Defendants, Union Pacific Railroad Company; a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, the sum of Eight Thousand Six Hundred Seventy-five and 40/100 Dollars (\$8,675.40), with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until paid, together with the plaintiff's costs and disbursements incurred in this action.

The costs accrued in this action amount to the sum of \$68.85, which said sum was written this 26 day of March, 1945, in the space reserved for the insertion of the amount of such costs.

Dated and done in open Court this 26 day of March, A. D., 1945.

/s/ BEN HARRISON

District Judge of the United  
States, Presiding.

Approved as to form, this 26th day of March, 1945.

LEO A. McNAMEE

Attorney for the Defendants.

Filed March 27, 1946. O. E. Benham, Clerk. By J. P. Fodrin, Deputy.

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[Title of District Court and Cause.]

ALTERNATIVE MOTION FOR JUDGMENT,  
OR NEW TRIAL

Come now the Defendants, Union Pacific Railroad Company, and Los Angeles & Salt Lake Railroad Company, and file their Motion, praying that the Jury's verdict herein and the Judgment rendered and entered thereon, be set aside and Judgment entered herein for the Defendants, notwithstanding the verdict, and their Motion for New Trial in the Alternative, and as grounds therefor, state:

I.

Grounds for Motion for Judgment, notwithstanding verdict:

(a) It appears from the uncontradicted evidence admitted at the trial, that Plaintiff's cause of action was based upon an oral contract and it was therefore barred by the Statute of Limitations, as alleged in the third defense set forth in the Defendants' Answer;

(b) The Court erred in its decision to the effect

that Plaintiff's cause of action was founded upon an instrument in writing, to-wit: the Collective Bargaining Agreement admitted in evidence as Plaintiff's Exhibit 2.

## II.

### Grounds on Motion for New Trial:

Defendants move the Court to set aside the verdict rendered in the above entitled action, on the 20th day of March, 1945, and to grant a new trial, on the following grounds:

(a) The verdict is contrary to law;

(b) The evidence was insufficient to justify the verdict, in that it appears from all the evidence introduced at the trial without contradiction, that the Defendants offered to reinstate Plaintiff in his same position, without prejudice to Plaintiff's rights under the original contract of employment, not later than October 21, 1938;

(c) The Court erred in overruling Defendants' objections to the introduction of Plaintiff's Exhibits Nos. 7, 9, 10, and 11, respectively;

(d) The verdict is excessive and appears to have been given under the influence of passion and prejudice;

(e) The Court erred in refusing to instruct the Jury as requested by the Defendants, as follows:

“If you find from the evidence that during Plaintiff's employment with said Defendant Railroad Companies that said Railroad Companies had in

effect a rule providing that employees who had been disabled by reason of accident, which predisposes them to sudden incapacity, must pass a satisfactory physical examination before resuming duty, and if you further find that Plaintiff had an accident on the 25th day of February, [172] 1934, which resulted in an injury to him which at that time incapacitated him from performing the duties of Railway Carmen, and if you further find that he was examined by Railroad Company doctors from time to time thereafter who, in good faith, found that Plaintiff was so disabled by reason of his said injuries as to interfere with the proper performance of his duties, with safety to himself or others, then I instruct you that Defendants were not liable to Plaintiff for suspending him from service during the time Plaintiff was so found to be so disabled as to interfere with the proper performance of his duties with safety to himself and others.”

This Motion is based upon the records and proceedings in this action.

LEO A. McNAMEE,

Attorney for Defendants.

Fired March 27, 1945. O. E. Benham, Clerk. By J. P. Fodrin, Deputy.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Messrs. Ham & Taylor, Attorneys for Plaintiff,  
Las Vegas, Nevada:

Please Take Notice: That the undersigned will bring the attached Motion on for hearing before this Court, at the Courtroom of the United States District Court, in the Federal Building, in the City of Las Vegas, Clark County, Nevada, on Thursday, the 29th day of March, 1945, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard.

Dated: this 27th day of March, 1945.

LEO A. McNAMEE

Attorney for Defendants.

Service of the foregoing Notice of Motion, together with the Motion attached thereto, is hereby acknowledged this 27th day of March, 1945, and the shortening of the usual five days' notice of said Motion is hereby agreed to.

HAM & TAYLOR

By RYLAND G. TAYLOR

Attorneys for Plaintiff. [173]

Received and Filed March 27, 1945. O. E. Benham, Clerk By J. P. Fodrin, Deputy.

In the District Court of the United States  
in and for the District of Nevada

No. 160

W. L. OLIVE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, LOS ANGELES & SALT LAKE  
RAILROAD COMPANY, a corporation, and  
WILLIAM MORLEY,

Defendants.

#### MEMORANDUM OPINION

The defendants moved for a new trial on numerous grounds, which were directed to be submitted on briefs. In the brief submitted by defendants, the only ground urged is the sufficiency of the evidence to sustain a verdict in excess of \$2250.00. Defendants insist that the plaintiff was given the opportunity to return to work without prejudice on or prior to October, 1938. This the plaintiff emphatically denied. In this regard the evidence was exceedingly conflicting and, in my opinion, it presented a jury question. To grant a new trial would be substituting my judgment for that of the jury. It was very apparent, not only from the cold record, but from the very atmosphere of the case that the defendants at no time had offered the plaintiff a bona fide opportunity to return to work. There is no question that the plaintiff was ready and anxious to return to the only occupa-



tion he was fitted for. The court recognizes, as the jury must have recognized, that the defendants were desperate for skilled workmen during this period, yet, for some unknown reason, the plaintiff did not return to work. The jury found that the fault was with the defendants, hence the verdict in favor of the plaintiff.

Motion for new trial denied.

Dated: This 22 day of May, 1945.

BEN HARRISON J.

Received and filed May 24, 1945. O. E. Benham,  
Clerk.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT  
OF APPEALS

Notice Is Hereby Given: That Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, Defendants, above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final Judgment entered in this action on March 26, 1945.

Dated: August 17, 1945.

LEO A. McNAMEE and

FRANK McNAMEE, Jr.

By LEO A. McNAMEE

Attorneys for Appellants.

[Endorsed]: Filed Aug. 20, 1945. [176]

[Title of District Court and Cause.]

BOND ON APPEAL

SUPERSEDEAS BOND

Know All Men By These Presents:

That Continental Casualty Company, a corporation of the State of Indiana, authorized to do a general surety business in the State of Nevada, as, Surety, is held and firmly bound unto W. L. Olive, Plaintiff, above named, and to his executors, administrators and assigns, in the full and just sum of Twelve Thousand (\$12,000.00) Dollars, for the payment of which well and truly to be made, said surety binds itself, its successors and assigns, firmly by these presents.

The conditions of the above obligation are such that,

Whereas, on March 26, 1945, in an action pending in the United States District Court, in and for the District of Nevada, between W. L. Olive, as Plaintiff, and Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, as Defendants, a Judgment was rendered against said Defendants, and the said Defendants having filed a Notice of Appeal from said Judgment, to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Union Pacific Railroad Company, a corporation, and said Los Angeles & Salt Lake Railroad Company, a corporation, shall prose-

cute their appeal to effect, and shall satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the Judgment is affirmed, or [177] shall satisfy in full such modification of the Judgment and such costs, interest and damages as the said Circuit Court of Appeals may adjudge and award, then this obligation to be void; otherwise, to remain in full force and effect.

In Witness Whereof, said Continental Casualty Company has caused this obligation to be executed and its corporate seal to be hereto affixed by its proper officers thereunto duly authorized, this 20th day of August, 1945.

CONTINENTAL CASUALTY  
COMPANY.

By A. W. BIKKER,  
Its Attorney in Fact.

The foregoing Bond is hereby approved this 28 day of August, 1945.

/s/ BEN HARRISON,  
District Judge of the United  
States, Presiding.

[Endorsed]: Filed Aug. 30, 1945. [178]

[Title of District Court and Cause.]

### STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in sustaining plaintiff's Motion to Strike the Third Defense of Defendant's Answer.

2. The Court erred in holding that Plaintiff's cause of action was not barred by the four year statute of limitations as pleaded in Defendants' Third Defense set forth in Defendants' Answer.

3. The Court erred in refusing to give defendants' requested instruction "D-10".

4. That the evidence was not sufficient to support the Verdict.

5. That the Verdict was contrary to the evidence.

6. That the damages awarded plaintiff by the Verdict were excessive.

LEO A. McNAMEE

FRANK McNAMEE, Jr.,

Attorneys for Defendants.

Service of the foregoing Statement of Points admitted by receipt of a copy thereof, this 10th day of September, 1945.

HAM & TAYLOR,

By RYLAND G. TAYLOR,

Attorneys for Plaintiff.

[Endorsement]: Filed Sept. 12, 1945. [179]

[Title of District Court and Cause.]

ORDER

Upon stipulation of counsel, good cause appearing therefor, and upon motion of Ham & Taylor, Attorneys for the plaintiff, it is

Ordered that the plaintiff may have to and including November 16, 1945, in which to serve and file designation of additional portions of the record, proceedings and evidence to be included in the record on appeal in this action.

Dated and done this 17th day of September, 1945.

BEN HARRISON,

District Judge of the United  
States, Presiding.

[Endorsed]: Filed Sept. 19, 1945. [180]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD AND DOCKETING APPEAL

Pursuant to the Stipulation of the parties filed herewith, It Is Hereby Ordered that the time for filing the record and docketing the appeal in the Circuit Court of Appeals, Ninth Circuit, is hereby

extended for an additional period of sixty days, to-wit: to and including November 29, 1945.

Dated this 17th day of September, 1945.

BEN HARRISON,

United States District Judge.

[Endorsed]: Filed Sept. 19, 1945. [181]

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

On Appeal from the District Court of the United  
States, in and for the District of Nevada—  
Case No. 160.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, and LOS ANGELES & SALT  
LAKE RAILROAD COMPANY, a corpora-  
tion,

Appellants,

vs.

W. L. OLIVE,

Appellee.

ORDER EXTENDING TIME FOR FILING  
RECORD AND DOCKETING APPEAL

On motion of Appellants, and good cause appearing therefor, It Is Hereby Ordered that the time for filing the record and docketing the appeal in the United States Circuit Court of Appeals, for the



Ninth Circuit, is hereby extended to and including December 18, 1945.

Dated this 9th day of November, 1945.

WM. E. ORR,  
Circuit Judge.

A true copy.

Attest: November 14, 1945.

(Seal) /s/ PAUL P. O'BRIEN,  
Clerk.

[Endorsed]: Filed November 14, 1945. Paul P. O'Brien, Clerk.

[Endorsed]: Filed November 16, 1945. Amos P. Dickey, Clerk. By J. P. Fodrin, Deputy. [182]

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In the District Court of the United States in and  
for the District of Nevada

No. 160

W. L. OLIVE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, and LOS ANGELES & SALT  
LAKE RAILROAD COMPANY, a corpora-  
tion,

Defendant.

#### STIPULATION AS TO RECORD ON APPEAL

Whereas, on the 10th day of September, 1945,  
the defendants and Appellants served upon the

Plaintiff the designation of record to be contained in the record on appeal in said action, and filed the same with the Clerk of said Court on the 12th day of September, 1945; and

Whereas, pursuant to a Stipulation of the parties an order was made extending the time for filing said record and docketing said appeal in the Circuit Court of Appeals, to and including the 29th day of November, 1945; and

Whereas, the parties hereto have agreed as to what portions of the record, proceedings and evidence shall constitute the record on appeal in this action; Now, Therefore,

It Is Hereby Stipulation Between the Parties Hereto:

That the following "Designation of Record" be substituted for the "Designation of Record" heretofore filed by Defendants and Appellants, to-wit:

### DESIGNATION OF RECORD

The record on appeal in this action shall consist of the following portions of the Record, proceedings and evidence, to-wit:

1. Complaint.
2. Petition for Removal of Cause to the United States District Court. [183]
3. Notice of Hearing on Petition for Removal.
4. Bond on Removal.

5. Order for Removal.

6. Clerk's Certificate with Record.

7. Defendants' Answer to Complaint.

8. Plaintiff's Amendment to Paragraph X of Complaint. (Omit all of Exhibits "A" thereto attached, except Rules 22, 23, 38 and 45.)

9. Defendants' Answer to Amendment to Complaint.

10. Plaintiff's Motion to Strike Paragraph III of the Second Defense and the entire Third Defense of Defendants' Answer.

11. Order of March 19, 1945, sustaining Plaintiff's said Motion to Strike. (See line 13, p. 96, to line 11, p. 97.)

12. The transcript of the evidence, two copies of which are filed herewith.

13. Defendants' requested Instruction D-10, which the Court refused to give and which is as follows:

"If you find from the evidence that during Plaintiff's employment with said Defendant Railroad Companies that said Railroad Companies had in effect a rule providing that employees who had been disabled by reason of accident, which predisposes them to sudden incapacity, must pass a satisfactory physical examination before resuming duty, and if you further find that Plaintiff had an accident on the 25th day of February, 1934, which resulted in an injury to him which at that time

incapacitated him from performing the duties of Railway Carman, and if you further find that he was examined by Railroad Company doctors from time to time thereafter who, in good faith, found that Plaintiff was so disabled by reason of his said injuries as to interfere with the proper performance of his duties, with safety to himself or others, then I instruct you that Defendants were not liable to Plaintiff for suspending him from service during the time Plaintiff was so found to be so disabled as to interfere with the proper performance of his duties with safety to himself and others.”

14. The Verdict.

15. Judgment.

16. Defendants’ Alternative Motion for Judgment or New Trial.

17. Notice of Motion.

18. Order Denying Motion for New Trial.

19. Notice of Appeal. [184]

20. Defendants’ Exhibit “C” (eliminate “1st Test—Acuteness of Vision”; “2nd Test—Color Perception”; and “3rd Test—Hearing”).

21. Defendants’ Exhibit “I”.

22. Plaintiff’s Exhibit 5.

23. Plaintiff’s Exhibit 8 (If it appears by endorsement thereon to have been admitted in evidence).

24. Plaintiff’s Exhibit 10.

25. Statement of Points on which Appellants intend to rely.

26. This Designation.

That the record on appeal in this action consist of the portions of the record, proceedings and evidence as above designated, and that the original of Plaintiff's Exhibit 2 be sent to the Appellate Court pursuant to Rule 75(i) for inspection by the Court.

Dated this 26th day of October, 1945.

LEO A. McNAMEE,  
FRANK A. McNAMEE, JR.,  
Attorneys for Defendants and  
Appellants.

HAM & TAYLOR,  
/S/ By RYLAND G. TAYLOR,  
Attorneys for Plaintiff and  
Respondent.

[Endorsed]: Filed Oct. 29, 1945. [185]

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[Title of District Court and Cause.]

### ORDER

It appearing from the Stipulation as to Record on Appeal, filed herein, that the parties to said action stipulated that the original of Plaintiff's Exhibit 2 be sent to the Appellate Court, pursuant to Rule 75(i), for inspection by the Court.

It Is Hereby Ordered that the Clerk of this Court send to the Clerk of the United States Circuit Court of Appeals, with the record on appeal herein, the original of Plaintiff's Exhibit 2, referred to in said record.

Dated this 27th day of November, 1945.

ROGER T. FOLEY,  
District Judge.

[Endorsed]: Filed Nov. 28, 1945. [186]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT

United States of America,  
District of Nevada—ss.

I, Amos P. Dickey, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of W. L. Olive, Plaintiff, vs. Union Pacific Railroad Company, a corporation; Los Angeles & Salt Lake Railroad Company, a corporation, and William Morley, Defendants, said case being number 160 on the civil docket of said Court.

I further certify that the attached transcript, consisting of 188 typewritten pages numbered from



1 to 188, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the Stipulation and Designation of Record, filed in said case and made a part of the transcript attached hereto, as the same appear from the [187] originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid, except that the title of the court and cause have been eliminated in most instances.

I further certify that accompanying this record, in accordance with stipulation and order of court, is the original of Plaintiff's Exhibit No. 2, being Union Pacific System Schedule of Rules.

And I further certify that the cost of preparing and certifying to said record, amounting to \$23.85, has been paid to me by Leo A. McNamee, Esq., attorney for the appellants.

Witness my hand and the seal of said United States District Court this 30th day of November, 1945.

(Seal)

AMOS P. DICKEY,  
Clerk, U. S. District Court.

[Endorsed]: No. 11200. United States Circuit Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a corporation, and Los Angeles & Salt Lake Railroad Company, a corporation, Appellants, vs. W. L. Olive, Appellee. Transcript of Record. Upon Appeal for the District Court of the United States for the District of Nevada.

Filed December 3, 1945.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11200

UNION PACIFIC RAILROAD COMPANY, a  
corporation, and LOS ANGELES & SALT  
LAKE RAILROAD COMPANY, a corpora-  
tion,

Appellants,

vs.

W. L. OLIVE,

Appellee.

STATEMENT OF POINTS ON WHICH AP-  
PELLANTS INTEND TO RELY ON AP-  
PEAL AND DESIGNATION OF RECORD  
THOUGHT NECESSARY FOR THE CON-  
SIDERATION THEREOF

Appellants hereby adopt as their points on ap-  
peal, the "Statement of Points" appearing in the  
Transcript of Record, and designate for printing  
the entire Transcript of Record.

Dated this 10th day of December, 1945.

LEO A. McNAMEE,

FRANK McNAMEE, JR.,

Attorneys for Appellants.

Service of the foregoing admitted this 11th day  
of December, 1945.

HAM & TAYLOR,

By RYLAND G. TAYLOR,

Attorneys for Appellee.

[Endorsed]: Filed December 13, 1945. Paul P.  
O'Brien, Clerk.

